

THE PATTERN OF
COMPETITION



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WALTON H. HAMILTON



NEW YORK
COLUMBIA UNIVERSITY PRESS

1940

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COLUMBIA UNIVERSITY PRESS, NEW YORK

FOREIGN AGENTS: OXFORD UNIVERSITY PRESS, Humphrey Milford, Amen House, London, E.C. 4, England, AND B. I. Building, Nicol Road, Bombay, India; MARUZEN COMPANY, LTD. 6 Nihonbashi, Tori-Nichome, Tokyo, Japan

MANUFACTURED IN THE UNITED STATES OF AMERICA

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EDITOR'S PREFACE

WITH THE passage of time, great and significant changes have occurred in the political and economic arrangements of mankind. Social relationships have become more complex. In part, because of this complexity, careful work in the social sciences has made it increasingly necessary for scholars to interest themselves in minutiae. Monographs of scholarly merit but of limited social significance have characterized the literature. In economics, especially, there appears to be need for a convenient means of synthesis.

While social relationships have become more complex, the rate at which they are changing has accelerated. The world at large appears to be in a state of rapid transition, and economic institutions are no exception to this sweeping movement. No one can hope to understand the significance of change in its entirety; but intelligent minds aspire to see large situations as a whole and in relation to each other. In the words of William Fielding Ogburn and Alexander Goldenweiser (*The Social Sciences and Their Interrelations*):

The increasing specialization in the social sciences has been accompanied by greater ignorance as well as by greater knowledge. This handicap has been especially felt because the rapidity of social change in recent years has made it difficult for branches of knowledge in the social sciences to remain within the bounds prescribed under earlier situations. Furthermore, with the rise of the modern emphasis on social research, it has been found that many problems lie in several different fields and that their solution demands methods from the various social sciences. The increasing specialization also

is part of the great accumulation process in social knowledge. This accumulation process is so great that it has become exceedingly difficult for any one individual to become well oriented in the general field of the social sciences.

The Department of Economics of Columbia University has felt that distinguished scholars would welcome an opportunity to summarize the recent work in their respective fields and to relate this work to other phases of the social sciences. Students in the universities and in the world of daily affairs can gain much from the provision of such summaries. It is with these purposes in mind that a series of lectures on the economics of public policy has been incorporated in the curriculum of the Summer Session of Columbia University.

Men and women outstanding in their respective fields were invited to present groups of concise lectures. These lectures represent the efforts of advanced scholars to summarize the recent contributions which they and others have made. These ideas are significant in the shaping of public policy. At the same time, the development of public policy is significant to the course of economic thought.

The 1940 lectures, which treat of both phases of this inter-relationship, are now published by Columbia University Press as follows:

Public Utilities and the National Power Policy, by James C. Bonbright

The Pattern of Competition, by Walton H. Hamilton

Taxation and Fiscal Policy, by Mabel Newcomer

The Search for Financial Security, by Robert B. Warren

Labor and the State, by Leo Wolman

COURTNEY C. BROWN

Columbia University

August 15, 1940

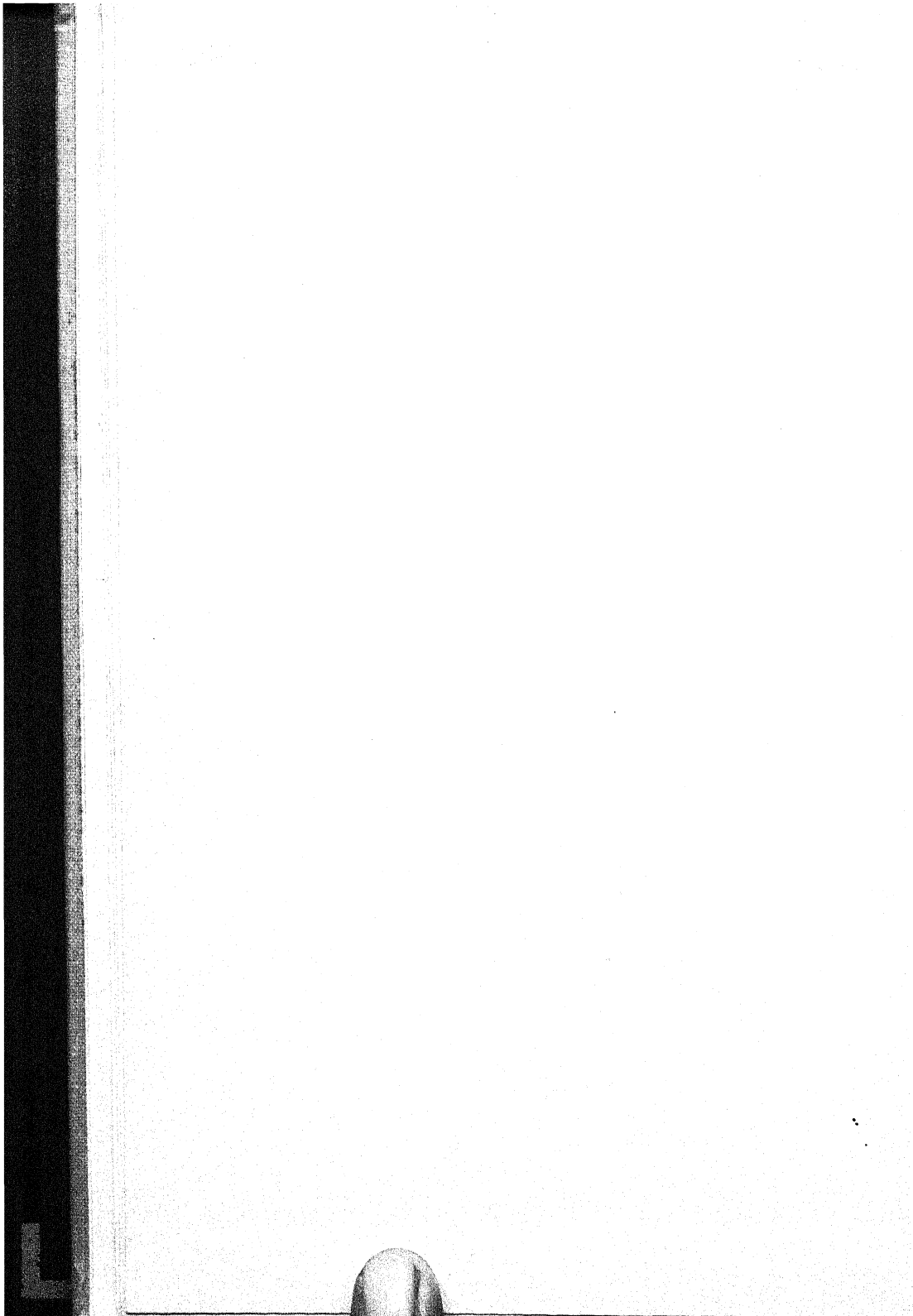
AUTHOR'S PREFACE

HERE is no more than an introduction to the competitive pattern. The national economy is made up of industries which intermingle and overlap; yet each has its own rich, colorful, intricate design. Little of this landscape has been explored in an analytical way; even less of what has been discovered has been made available to the reader curious of the realities of modern industrialism. The intent here is to reveal something of how competition operates and the difficulties which its regulation is up against.

An over-all picture cannot be genuine if it forsakes the concrete. In recent years the author has been party to a number of ventures into this domain, and several have found their way into print. It is impossible to set down a general account without taking trails that have been followed before. In articles on Competition and Economic Organization in the *Encyclopedia of Social Sciences*, in a series of clinical reports on various industries published in *Price and Price Policies*, and in a monograph on *Antitrust in Action* for the Temporary National Economic Committee, the subject is developed with detail, qualification, and footnotes. One cannot, I take it, plagiarize himself. But in these pages I have recklessly exploited the work of my coauthors in earlier volumes and of fellow workers in the Antitrust Division of the Department of Justice. It is their investigation into particular industries which has made possible this attempt at a general statement.

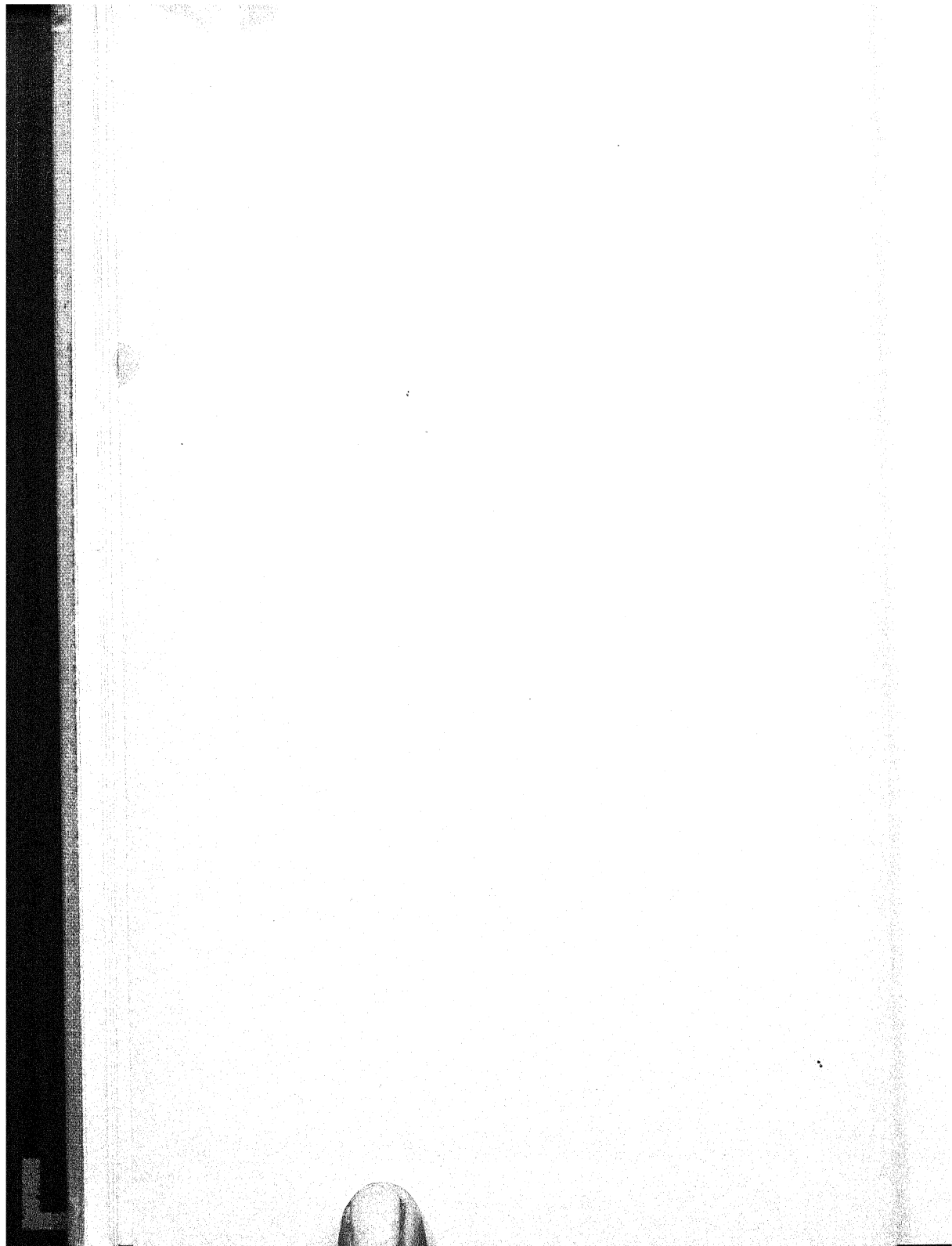
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Yale University
September 11, 1940



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I

AS REASON WOULD HAVE IT

Crisis Asks a Question

The test of an economic system is how it performs in a crisis. In normal times—if times will ever again have a norm—any old economy works, or at least works as well as it works. Its activities fall into grooves set by convention; innovation remains obligingly off-stage; minds, dulled to skepticism, do not question things as they are. But a crisis presents a challenge to all that agglomerates into the prevailing order. Circumstance sets a strange stage; novelties, without waiting their cues, obtrude upon the scene; the course of events forsakes the plot of the drama. The structure of the economy is subjected to terrific stress and strain; its performers take whatever comes with whatever defiant or stumbling stride they can command; alert minds become critical of what they had taken for granted.

In less than a quarter century the national economy has experienced a trilogy of crises. First came the staccato blows of the business cycle. We are so accustomed to ups and downs, to peaks and troughs, to fat years followed by lean ones that men of learning have come to speak unblushingly of “the rhythm of industrial activity.” But somehow rhythm took on an irregular beat, and the phenomena refused to obey the laws which wise men had made up. The violence of the swing, and the duration of its periods, were like nothing known be-

fore. In the twenties came the great upsurge. The present hummed; the future was sold; trends beneath the surface were ignored; a series of fictions was paraded as the wealth of the nation. But the faith that moves securities could not endure; and, as the contagion of doubt swept the land, the structure of inflated opulence came tumbling down. The gears no longer easily engaged; labor was left unemployed and material resources unused; the impaired mechanism of production blundered along. The raw materials of the standard of life were all available; the urges which make industry go could no longer catch them up into a going concern.

Next came the crisis marked by the appeal to authority. In good times the state is the villain in the economic piece; in bad times, it is shifted to a heroic role and asked to help business over the hard places. It had happened often enough before; but again the public effort had a scale and a range which knew no precedent. A low interest rate proclaims an abundance of capital and the financier is a broker in funds—yet the Government was forced to become investment banker to the nation. Free enterprise is capable of regulating its own affairs—yet a national recovery administration was set up to halt a retreat and to allow the disorderly ranks of business to be reformed. The provision of employment is the avowed office of business enterprise—yet a scheme of public relief had to be devised for willing workers who could find no foothold within the economy. The state was called upon to safeguard for organized labor a process of collective bargaining; to accord to farmers, in the sale of their staple crops, the protection which the market no longer accorded; to appear as the trouble-shooter whenever the operation of conventional arrangements appeared to break down. Thus for the emergency at least—an emergency which promises to endure—task after task has been unloaded by a sluggish economy upon an amateur state.

And now comes the crisis of national defense. Again we

have at various times directed national wealth to a military objective. But effort in the past has moved toward a definite objective which once realized has ceased to command. Now Munich resumes where Waterloo left off; and, with a machine process which demands a continent for its operation, we seem destined to return to an era of competitive nationalism. When the current tide has spent its strength, four or five great political economies—the United States, Germany, Japan, probably Great Britain, possibly Russia—will confront each other in militant array. Armament, as well as salesmanship, will be weapons to extend trade areas, and peace will endure as an armistice under arms. Defense, then, will take its place as a dominant concern of public policy. It will become an industry which will tower above all others and make them tributary. Corporation, trade, business will become instruments; industries will be re-tooled; the whole economy will be streamlined to serve a national purpose.

The three crises now focus upon the national economy. Business, with its violent rhythm, has of late seemed unable to take an orderly course or to impose a trim design upon industry. The state, as a novice, with a backward art unfortified by experience, has committed itself to public control. A program of national defense demands that all wealth put on the livery of a militant mercantilism. These crises, of course, do not create the problem into which they converge. They are themselves the creatures of the forces which they throw into relief. They come as dramatic expressions of trends long since manifest. A cumulative experience questions alike the independence of business enterprise and its capacity for self-government. Although it has been caught unprepared, the state has for some time been destined for the office of industrial direction. And the clash between the machine process and the political map has long been seething, has provoked intermittent outbreaks, and was over-ripe for solution. A modern industrial

system cannot operate across a topography broken up by the fault lines of a lingering feudalism.

And mind, as well as trend and event, has its causal part. A change in values, in ways of looking at things, writes obsolescence against old problems and trumpets new ones. Things which once bothered cease to matter; we become intolerant of things to which we were once oblivious. As culture is caught in the sweep of volcanic forces, we react to immediate pressures, and move only slowly to an over-all view. As consciousness of wrongs increases, impatience eventually breaks its bonds. It is the march of armies and the clash of armaments which today prompt our hurried activities. Yet such military phenomena are the superficial outcroppings of great changes which we can hardly outline. A social order is passing; another, whose character is still to be revealed, rushes toward us. A dynamic world is the creator; the three crises converge to put the question.

Thus the movement of stress invites critical judgment. It sharpens sight, provokes doubt, demands proof of all things. It invites a searching inquiry into a national economy which in ordinary times we are accustomed to take for granted. It demands a detached appraisal of a scheme of arrangements within which we live, move, and have our everyday being. That scheme, in the American language, is known as free enterprise. It is, after the manner of its operation, usually spoken of as competition. Accordingly the discussion turns to the mechanics—or is it the usages?—which make up the competitive system.

An inquiry into competition must begin with the question of why we want to know. It is, of course, altogether proper for scholars in a "scientific way" to busy themselves with the phenomena of competition, to explore its generic nature, to circumscribe its concept, to discover its laws. Nor can exception be taken when the mysteries of a pure competition are laid bare

or the operation of a system of perfect competition is fully exposed. Such academic exercises are for minds whose delight it is to turn a handful of postulates into an articulate system; they well serve persons who must have their truths simple, round, and universal. But pure competition is a thing of the mind rather than of the economy, and a perfect competition is far more a creature of intellectual method than of industrial reality. And as for a competition-in-general, that is a luxury of the schools which at this tide in the affairs of the nation we can hardly afford.

So the interest here is practical rather than academic. The concern is with the competition of public policy, and it is only as it feeds that stream that the competition of the books is relevant. Can our economy be described in terms of competition? How much variation marks the competitive design? What of exception, compromise and blurred line? How much of usage, how much of mechanics marks its operation? How well does the national economy, under a regime of competition, discharge its office? What has been the place of competition in public policy, and how dominant has that policy been in the direction of industry?

In larger terms—is competition an effective instrument of order and justice which a society can use at its will? Is it, instead, an institution of transition, an economic order which lives precariously between two eras of authority? Or is it, after all, a great myth by which we reconcile ourselves as best we can to a business system which goes its own way? And what then is to be its place in the national economy which presently we are to re-design?

Blueprint and Apologia

A commitment to free enterprise is deeply embedded in public policy. A score of statutes proclaim a competitive design to which all industrial conduct is expected to conform. The Sher-

man Act, "a charter of freedom" for American business,¹ in the name of the public bids men of all trades to compete. It is flanked by the Clayton and the Robinson-Patman Acts which prescribe for business a code of fair competition. The acts protecting farmers' coöperatives seek to lift groups weak in bargaining power to a plane upon which they can meet the parties with whom they must deal upon something like equal terms. But the law commands that collective endeavor must stop sharply at the very threshold of monopoly. When departures from the competitive norm are allowed—as they are for railroads and public utilities—a commission is established to insure to consumers as fair a treatment as a competitive market would afford. And when the Government enters the domain of power and light, its yardstick is presumed to approximate the results of a competitive market. In all legislative control, state and national, the competitive norm is not far away.

The norm of competition is far older than the public policy in which it is embodied. It is an intellectual expression of an economic order which was on its way. Its main outlines were shaped by the facts of industrial development. The medieval regime of prelate and baron, of fief and glebe had passed. A surge of commercial activities had broken down the channels in which it was expected to flow. The sweep of change was too much for the law and a scheme of regulation for industry had rusted into repeal. The medieval way of authoritative control was outmoded; it no longer squared with the way people had come to think; its commands, many times revised to meet strange conditions, could no longer secure obedience. Monopoly was likewise unacceptable; it delivered the terms of sale into the hands of one of the two parties to the bargain, and experience had demonstrated that an exclusive privilege could

¹ Mr. Chief Justice Hughes, in *U.S. v. Appalachian Coals*, 288 U.S. 344, 359 (1933).

easily become a thumbscrew. Neither overlordship by the state nor a feudal industrial domain would do.

The alternative was the way of petty trade. In England, an era of handicraft and a loose local control separates feudalism from industrialism; in America, it was by way of the small town that a self-sufficient agriculture gave way to a national economy. As fact and as norm, competition is a product of this period of transition. There was no conscious intent to pass from status to contract, to give to property a pecuniary value, to replace custom by the market in the making of prices. Instead, for the most part, the arrangements which make up competition just grew. They represent the accommodation of a myriad of men, in a million places high and low, to their own little compulsions. The system is a cumulation of countless expedencies; the theory is a smoothing over of the roughest sort of an empirical structure. The general features which characterize competition came into being long before its elements were remarked or put together. The mental picture is a distillation of the survivals from a series of chance judgments.

In time the bold outline of competition came to stand out plainly on the face of the economy. In England as the guilds declined in power they were no longer able to defend their privileges. Since the Crown had little incentive to protect a decadent institution, trades came to be open to all who cared to take their chances, and men who entered as trespassers remained by right. Many sellers were thus matched against many buyers, and as a result deals became free. Since each of the parties had an alternative, both had control over the terms of the bargain. Thus, so long as competition endured, the market itself was a crude agency of economic order. In America, where a continent had to be possessed, the turbulent course of events allowed little opportunity to authority. Even land was possessed a little faster than the law could keep up and men chose their occupations at will for there was no power to stop them.

The only protection for the buyer was to find a man who would let him have the goods for less; for the seller, to hunt until he found someone who would give more. Thus America underlined an imported notion and norm; to the native "the higgling of the market" came to be common sense.

As events go their way, the intellectual stands upon the side lines. It is his task to reduce to definitive terms the system in the making. As an economy comes to prevail, he fits it out with blueprint and apologia. The economists—at least those who breathed the climate of their century—wished well by competition, and set about creating a likeness which did it proud. In this endeavor they made use of the best ideological stuff at hand. The academic atmosphere was saturated with mechanistic notions, and they were captivated by the beauty and precision of the Newtonian theory which, for the moment at least, had brought law, order, and economy into the world of nature. Accordingly, with little thought of deliberate borrowing, they set about creating a mechanics of competitive business. To this end they employed a bit of observation, a goodly amount of abstraction, and a bountiful measure of the most rigorous logic of the day. They made price—or value—the focus of their attention; selected buying and selling as the essential phenomena to be studied; disentangled the market process from general industrial activity, and sought out—in isolation from authority and culture—the principles of the economic order.

A concern with mechanics made the problem of economy the crux of the matter. Its basic terms are a population of insatiable wants and a world of stubborn and inadequate resources. Out of the finite materials of nature goods must be produced which will satisfy the demands of men. Since there is not enough to go round, the wealth of the community must be made to go as far as possible. The result is a great productive system, with the market in the foreground, through which raw materials

are painfully converted into pleasure-giving goods. The actors are human beings, impelled by the utilities which articles of consumption possess to overcome the personal disutility of producing them. Even capital, an accumulation of savings, has its source in the sacrifice involved in consumption deferred.

At the hub of all activity stands the market. Each must take to it his mite of labor or of property; from it each must fetch away the wherewithal of his living. In the market goods and services are all tagged with prices, and personal wealth comes by way of careful calculation and shrewd dickering. In disposing of goods and services, each person must compete with others who have like goods and services to sell. In seeking what one would have each has to bid up against others who would take it away. As a result, value is sovereign in the great competitive economy. An upward dart of price or a downward drop allows those who will pay most to purchase, gives an outlet to those who will sell for least, and effects a neat adjustment between demand and supply. It could not well be otherwise, for a double competitive process pits seller against seller and buyer against buyer. Thus if it chances that a price is too low to effect a balance, a flood of bids raises it to the proper level; and, if it is too high, a host of offers brings it down.

Nor is its efficacy of the moment only. As time brings the unfamiliar, it promptly rings the changes in response. The march of invention opposes new wares to old; rayon to cotton stockings, electric refrigerators to ice, radio to the phonograph. Wants even vie to create a market between unlike goods: an evening down-town and a trip to the country; a new car and an antique couch are rival claimants upon one's income. With price as the guide, competition continuously accommodates the production of goods to the changing demand for them. A new ware of trade, a novel invention, a revision of marketing arrangements gives an advantage to a business unit. Its rivals are forced to follow suit and the shock of temporary disturb-

ance is quickly spent. Thus, with some friction but without extravagant waste, competition accommodates an industrial system of many changing elements to the novelty in circumstances.

An abstraction transcends the series of concretions which call it into being. In its majestic sweep it cannot stop to give place to all the petty things which are not in accord. Accidents, tricks of one kind and another, combinations, frictions great and small, whatnots that will not fit in, are to be brushed aside; the transitory have no commerce with the eternal. In the long run competition gives practical assurance of order and justice to the affairs of industry. Its regime promotes efficiency in organization, economy in resources, fairness to the parties in interest, and orderly development in business. It tends to make each establishment in an industry tight and tidy, to fit establishments neatly together into industries, and to articulate industries into a streamlined economy.

It allows little tolerance to waste. The producer who would survive must give constant thought to keeping his house in order and cutting his expenses. Accordingly the ventures which make up an industry cannot continue to absorb more laborers, use more materials, or claim more investment funds than are necessary. It safeguards the interest of the consumer. No seller can continue against others by palming off low quality goods or in selling wares for what they are not; nor can he persist in charging what the traffic will not mercifully bear. The rule of competition insures to the workman the true and full value of his service; it guarantees reasonable arrangements in regard to hours, safety, health, discipline, hiring and firing. He is free to accept or reject a job, to offer his services to a rival firm, or to hawk his labor in another market. It accords justice to the enterpriser. Although it ruthlessly weeds out the inefficient, it insures a recovery of costs and a reasonable profit to every

concern for whose product the community has need. But, since the producer is ever alert to costs, there is a constant spur toward development in the industrial arts. The progressive individual reaps the reward for being alert and resourceful. Since improvements presently become common property, the consumer is the lasting beneficiary of discovery and invention. Thus justice is done among all parties who have a stake in the economy.

So it is that a delicate structure of responsive prices regulates the national economy. It effects, and keeps on effecting, the best mediation that may be between the wants of a people and the productive capacity of industry. The self-seeking individual is forced to have a thought about the community. Acquisition is endowed with a social purpose. Thanks to the harmony of a system, which is as it were an aspect of the order of nature, there is no antithesis between competition and coöperation; competition provides the mechanism of coöperation. It has, it is true, no power to give unity to multifarious activity; but a decentralized system, with the urge of self-interest to keep it going, maintains an order all its own. It converts a multitude of little judgments, made by interested parties, properly checked and balanced, into an economy at work.

There is, in short and in the abstract, a competitive order of economic forces acting of themselves and by themselves. The industrial system is an automatic self-regulating mechanism which continuously secures from a niggardly nature just such goods as yield the largest surplus of pleasures over pains. It is a Newtonian economic order wherein matter is replaced by wealth; attraction and repulsion give way to utility and disutility; the phenomena of the market, like those of the heavens, are given an equilibrium, a system of checks and balances keeps the machine in order; and the theory of the conservation of energy finds a parallel in the law of the economic maximum.

At the deft hands of the schoolmen competitive activity was converted into an account which was at once the great explanation and the great apology.

Belief Makes It True

A theory cannot go forward upon its own truth. Its integrity is only one of the trinity of conditions which makes for acceptance or rejection. Of the three, its ability to account for all the phenomena of the reality it professes to describe is of least account. Facts are many and varied; the tangle can never be encompassed in its entirety; an explanation cannot tediously await the interminable process of spade-work. We know what we want to find; the way of inquiry is as much an element of the result as the thing studied; the mind has its own tricks for surveying the parts and turning up a whole that is acceptable. After all, shadow rather than substance is the real actuality. It is more important that a theory should look like a theory. Its principles should be simple, clean-cut, and universal; each should be as abstract, precise, and definitive as a law of nature. And one by one they should fall as neatly into place in a closed system as do the propositions in Euclid or the articles of faith in a theology. Most important of all, it must ring true within its climate of opinion and unwittingly seduce minds to a belief in its statement.

As norm and notion, competition met gallantly this triple test. Its weakest appeal was in its accord with reality. But, so long as the actual remained unknown, the fiction had currency, and when the fiction came to be generally accepted, the facts could no longer matter. As a system of truth, it passed with distinction; none of the social studies could present so articulate a body of dogma. An economist could match truths with any physicist in the land, and the subtlety and intricacy of his unified structure set an example even to metaphysics. But rapture at the beauty of architectural design must not blind us to

the delicacy with which the explanation was fitted to the currents of prevalent opinion.

As written down, competition is a theory of the common good. In the Middle Ages the Christian church justified worldly activity by invoking a doctrine of stewardship. As the feudal regime crumbled, men spoke glibly of "function" where once they had said "service," and the older justification lived on. In the theory of competition there is no place for privilege, perquisite, or vested interest; no potentate of the national economy holds his place or wields his power by divine right. Instead all wealth is held by agency; the captains and corporals of business are persons in fiduciary posts; the industrial process is an instrument of the general welfare. In early accounts God, the Creator, an invisible hand had linked self-love with the public weal in the very nature of the universe; and after the Trinity was leveled to a theistic expression of cause and effect, Mammon still continued to wear the livery of the Deity. It was not themselves, but the community, which the officials of industry served. The system of free enterprise was made to operate in a climate of social morality.

Competition was fitted just as neatly into the legal establishment. In the Middle Ages men and material things together presented a colorful pattern. The lord had rights in his man as well as in his land; the man had rights in the land as well as in himself. A landless man was an anomaly; a holding of land naked of labor, a concept to which the manorial mind could hardly rise. The breakup of feudalism was a revolution in ideas and in social usage. The lord gathered into his hands all the equities in the land; the worker—freed from his bonds of serfdom or dispossessed of his rights in the land—became his own master. Now master and servant had to come to terms; their agreement was essential to unite property and labor in a productive enterprise. In a term now classic, a shift was made from status to contract and property was remade in the process.

It was, therefore, no difficult matter to equip competition with legal foundations. They consist of two pairs of institutions so definitely established that they can be taken for granted. They are private property and liberty of contract, the pursuit of gain and freedom of trade. The usages of private property decree who is to have, to hold, to control the various material resources of society; the usages of contract determine how persons, instruments, and resources are to be brought together in the productive process. Together property and contract supply the mechanism for the competitive process. The pursuit of gain draws individuals and corporations into industry and impels them to make and to market goods. The trade open to all who care to chance it enjoins vested interest, prevents monopoly, and limits moneymaking to reasonable gains. The bait of profit is beacon and guide; the freedom of the trade is brake and governor. Together they direct industry, keep it orderly and adjust it to whatever comes.

It is possible, of course, to thrust at the simplicity of such a legal foundation. Each of the four institutions is a compound of many usages. Private property is a bundle of equities, such as a voice in control, an interest in disposition, a claim to income, and they may be put together into many permutations. An ownership of the old homestead in fee simple is one thing, the agglomeration of privileges which make up the ownership of a railroad system, quite another. Contract, once thought of as a voluntary agreement between persons with equal bargaining power, is hard to hold to its norm. A dicker between two farmers over a couple of horses has little in common with the agreement between a giant power company and the lone ultimate consumer. The shrewdness and verbal fireworks of the primitive instance is succeeded by a cold attitude of take-it or leave-it in the sophisticated example. The craft of moneymaking has grown up. The corn grower and the automobile manufacturer, the baron of steel and the baronet of coal may

be equally devoted to their own pecuniary interests; but the acquisitive arts which they practice are very different. All trades may at law be equally open, but in fact they are buttressed about by very different barriers against the intruder.

But the skill of the system-builder is proof against all such variation. Presumption can be used to avoid what it might take chapters to explain away. All of these institutions are creations of growth; all of them are played upon by the trends of change; all of them invite human discretion as repeatedly as does the conduct of the industrial process itself. But, forget it; a theory in its cosmic sweep cannot stoop to detail, especially a detail that refuses to tarry. So the architect takes the norm of each institution, and by freezing it into a static unchangeableness finds that it ceases to bother. And common sense concurs in his judgment; for everybody knows exactly what private property, contract, profit-making, and freedom of a trade are. The theory of competition has the strength of its legal foundations.

It is possible to continue at will such a discovery of accord. The theory of competition moved in the direction in which nineteenth-century ideas, events, and usages were tending. A liberty of contract, which said in effect "the state should not meddle in matters which are the proper concern of the market," took up its abode in the due process clause and became a rampant doctrine of constitutional law. Government came to be an affair of limited powers and, after the manner of the Newtonian universe, to be conducted as an intricate mechanism of checks and balances. A native common sense created American institutions, not the least among which was the opportunity of every man to become master of his fate within a system of free enterprise. Politics conspired with ideology to degrade authority and to enthrone laissez-faire as public policy. Philosophy, true to its era, created an over-all apologia for such lesser trends by making the individual the ultimate term in all things

human. Even when a collect of persons became essential to carrying on, a fiction turned the corporation into an individual and all was well along the intellectual front. Even the Almighty could not escape the order of nature which scholars had invented, and the Deity was transmuted into a theological expression of a universe which runs itself automatically.

Thus for the economy the era shaped its own norm. Its likeness to reality was irrelevant; the symmetry of its architecture made it persuasive; its power lay in its accord with prevailing trends of opinion. It carried conviction because it expressed the wishful thought of the dominant interests in the commonwealth. The theory of competition is the product of an age of enlightenment; and, under its adroit guidance, the national economy is as reason would have it.

II

THE WAY OF MAN WITH INDUSTRY

Order as By-product

In a literal sense there is no such thing as industry. No immortal convention has ever drawn up a constitution for the economic order; no council of wise men has ever created an instrument for serving the needs of men with the stuff of the world. No series of ordinances sets down how resources are to be tapped, how the technical arts are to be encouraged, how the myriad hungers of a people are to be satisfied. There is no one who regards himself as an industrial agent or confesses his doings to be industrial phenomena. Industry in fact is not—like tree or frog or coke-oven or stock ticker—the name of something whose identity is concrete. It evokes verbal rather than visual images; it stands out sharply only in the abstract pages of books; a dozen artists called upon to reduce it to lines and colors would present as many separate pictures.

Instead, in all the world about us there is only a host of individuals, the situations within which they must act, the forces which converge to hurry them along their way. The doings of these men and women are of primary interest to themselves. The urges which carry them through the day's work find expression in a series of personal decisions; the catch-as-catch-can marks their response to the never-ending impact of circum-

stance. In homes, on farms, in factories, on the highways are millions of people doing the millions of tasks that fall to their separate lots. They are human beings who engage in human activities and whose conduct is human behavior. It is amid this babble of tongues, this confusion of purposes, this drama of divergent dramas that industry is to be found.

Yet a multiple affair like industry involves the whole community. One cannot make a living, as butcher, realtor, advertiser, or artist, without engaging others in a host of transactions. The incidence of one's everyday doings falls upon lives far and near; today's activities are born of yesterday's and resound in those of a never-ending tomorrow's. The actions of individuals aggregate into a mass that has outline; they are caught up into a stream of events that moves restlessly on. Men doomed to live together cannot carry on without some regard to the interests of each other. So arrangements gradually grow up which curb the excesses of self-seeking; groove channels for individual effort; and subdue multiple activities into a trim pattern. In time agencies of control arise to impose something of a larger will upon members of society.

Into the emergent design, correspondence and antithesis are alike woven. There must be somewhat of a trimness, purpose, and accord, for otherwise the necessities of a people would never be met. But clash and confusion are also parties to prevailing usage. There can be no common denominator to the needs, the wills, the aspirations of a people. The folkways must be accommodated to circumstances; necessity must tolerate departures. Social compulsions are in general terms; they must be applied to situations out of life, and application invites interpretation and makes way for exception. Usage and command must meet the event from around the corner; they must fight for their lives against the novelties which time will bring. The good books set down a pattern into which activities should fall; but, hurried and harassed as they are, the human archi-

sects have little time to consult them and must improve. The impersonal forces which shape industry are illiterate; blissfully unaware of the laws which economists have made up for them, blindly they impose their own stubborn wills. Thus the stream of human behavior runs endlessly on; an instrument for serving the community with the material means of welfare remains in the making; and the infinitude of variable and changing concretions transcend any pattern which may be set for industry.

Industry, therefore, has no origin in design. It is no mechanism artfully contrived for the performance of a social function. Its ways and its office run back into the unknown past. The want of a beaten path has left its mark upon it; the custom of yesterday rubs elbows with the usage not yet established. A series of fault lines, which cut athwart the industrial topography, tell of a lost record which still lives in its structure. A number of separate trades appear to be products of different ages. As a going concern, industry is the product of a long series of experiences. It is the creation of man's ingenuity through the ages—an instrument in the service of society brought into being by the petty accommodations of millions of men in endless procession to the changing circumstances of life. In a word, industry is a work of communal authorship.

Map of the Economy

A dominant mark upon American industry is the rapidity with which it all has come about. Things are in the saddle and the course of adventitious events takes its tumultuous way down the decades. Against the irregular beat of its hurried march, a deliberate shaping of industrial activities has been out of the question. At best little general direction could be given to a flow of activities headed for the unknown.

In fewer decades than the fingers on the hands has occurred a social revolution. An economy of small farms and petty trade

with a bit of commerce on the fringe has given way to a great industry. At the end of the Civil War the small farm was dominant. The family, committed to subsistence agriculture, undertook to produce its own living and formed an all-but-price-less economy. The household group was well or poorly off as it was hard-working, prudent, thrifty, and had the breaks of the seasons. It was still nature—and not the market—which made years fat or lean. The face of the land was almost covered with these almost self-contained industrial entities. But the small town near at hand was the forerunner of another economy. The pace of the new industrial life was quickened by a movement which began long ago, gathered momentum in the eighties and nineties, and still goes thundering down the new century. The inventor and the business man who set at large new forces did not consciously contrive to overthrow the old order. In innocence they merely set up a division of labor in a factory, replaced handwork by a machine process and put an electric spark to work. Yet, long before their insidious character was discovered, the newfangled things were undermining the ways of the fathers.

The emergence of American industry has been no single clear-cut event. The coming of the national economy lies in a myriad of little changes, few of which display outwardly their revolutionary intent. The man who had been beast of burden gave way to mechanical energy; the skills of artisans were replaced by a predesigned process of fabrication. A transport by rail enlarged the market, enabled goods to be produced far from their places of use, and localized in a few centers production for a nation. Many time-honored tasks—the baking of bread, the making of dresses, the supply of milk—were lifted from the domestic hearth to become industries. A number of modern mysteries were created—the cracking of gasoline, the assembly of automobiles, the creation of motion pictures. Man escaped the home to office, assembly line, salesmanship; and

after a decent interval woman followed. The farmer, bulwark of the old system, was dragged into the new, forced to become something of an industrialist, and in time came to speak the language of business with a slightly alien accent. Industries responded in quite different ways to the prod of advance; their several technical tasks lent themselves easily or clumsily to the new arrangements. From it all there emerged an interlocking of activities as broad as the continent. A single entity of constituent parts, it was none the less a great sprawling structure of materials, processes, goods, markets, prices, and credits. It was far too much the product of hurry and confused objectives to be well articulated.

It is, accordingly, not easy to catch a perspective of industry or to see its picture in clear lines. As a beginning a distinction, fundamental to all analysis, must be made between the technical process and the form of organization. The technical process is elementary; the raising of wheat, the making of paper, the brewing of beer, the preaching of the gospel are procedures which cater to human desires. Each rests upon a technology, uses material and human resources, and fashions a good or service for consumption. The form of organization is mediatory; in industry there must be arrangements, understandings, and things-taken-for-granted by which elements are drawn together into the production of wares and articles find their way from their makers to their users. Among the most primitive of peoples a cluster of usages determines who is to share in the hunt, how the catch of fish is to be divided, what rights various ones among the folk have in the tribal harvest. As a society grows in complexity, such simple conventions develop into a rich, colorful, and elaborate network. Ask where—in respect to production, methods of marketing, the ploughing back of returns, labor policy, and public relations—the discretion within an industry or one of its corporate entities lies, and the answer is an intricate scheme of control. The purchase

of a quart of milk, a fifth of Scotch, or ten gallons of gasoline is an everyday occurrence; yet a disclosure of all the conventions which impinge upon the act would fill a ponderous volume. A technical process, manifest in an aggregate of productive units, is one thing; the arrangements by which this instrument is made to serve the community are quite another.

It is, at the current level of our knowledge, impossible to produce a map of our economy. A glib term such as capitalism or free enterprise belies the variety of the phenomena it professes to sum up. As the prevailing order has come into being, the new has come yet the old has lingered. A single technique of production may be encased within quite distinct social usages; a single scheme of usage may envelop very different technical processes. A bit of almost everything may be found in an industrial system that is going; it is in respect to degree and relation that variation occurs. A sorting of industries into groups in accordance with their distinct schemes of control is at best an approximation. But, to take a gambler's chance, three rather distinct agencies of control have emerged to make technical processes serve human needs. In a rough sort of classification—in which lines are askew, domains overlap, and detail is hidden—these are the household, the state, and the business system. But these terms fail to preserve their integrity from industry to industry, and the economic order presents a somewhat disheveled landscape.

The household is the oldest of the three. In spite of its neglect by students it is probably the largest domain within the economy. It harks back to the good old days of price-less arrangements; until recently the realm of the homemade comprised the principal articles of consumption. Now its shrunken province is the rearing of children, the maintenance of the home, the conversion of a money income into a living. Its organization is communistic; its guide to action, "from each according to his ability, to each according to his need." The work-

ers in the home, even if as yet they have not risen to the status of wage slaves, are the largest group of laborers in the country. If it could be set down as a sum of money, the value added by household activity would dwarf a giant industry like coal or textiles. Its frontiers are guarded against no cultural invasion; its members who go forth to work and to shop bring back into family life the customs of the world without.

In the direction of the technical arts the state has its own domain. The national defense, the maintenance of order, the utterance of coin have long been under its control. In recent times such enterprises as carrying the mails, the provision of education, the promotion of the common health, the prosecution of scientific research have been added. Of late the internal combustion engine has made of concrete highways a public necessity. The state has directly or through subsidiaries operated banks, waterworks, power plants, street railways, merchant fleets, and other public utilities. In periods of depression it has extended financial help to private enterprise and through relief has attempted to atone for a deficit in private employment. At all times it has employed regulation to curb the excesses of business and to prevent the pursuit of gain from taking antisocial paths. With regard to police, defense, legislation, and education, the cash nexus between payment and value received is completely broken; such services are supported through taxation, itself an intricate social institution. The activities under state direction are organized in diverse ways, but a common characteristic of its supervision is an absence of profit-making. It may, in its activities, employ a pecuniary notation; but its control is rooted in consideration of public policy.

As it is the newest, so business is the most spectacular among the forms of organization. It was once a disreputable province on the fringe of industry; in the industrial revolution it came up in the world, and today occupies a domain much narrower than is generally supposed. As the theorists would have it,

business rests upon the four fundamentals of contract and property, money-making and open opportunity. But these elements—far from being unit characters—have their endless variations, and out of them industries have contrived quite distinct organizations. All of those elements are clearly to be discerned in the structures of steel, cement, automobiles, gasoline, whiskey, and milk; yet each of these industries has evolved its own unique business pattern. Alike with promptness and delay, waste and efficiency, business accommodates as best it can the various industries to the common good. A hegemony of independent and overlapping domains is apparent; an articulate national economy is not yet visible to the naked eye.

In simple fact the use of such words as family, the state, business is overneat. No one of them is an autonomous bundle of arrangements; they do not come done up in tidy packages with labels on the outside. Even less general terms intended to distinguish one business design from another—free enterprise, competition, monopoly, public utility—are words of little precision and quite devoid of color; they cannot communicate pictures of the bundles of concretions they profess to describe. Moreover, no agency of control is sovereign in its realm. The domestic government of the family is communistic; since its members sally forth to work, to pick up income and buy, its foreign relations are on a business basis. Its rule is compromised by the law, the prevailing morality, the impinging folkways. The state tags its services with prices, yields to the pressure of groups, and serves the interests which make up the commonwealth. The operation of business, pivoted upon the market, is conditioned by the trade association, the labor union, the customs of the industry, the obtrusion of government. Each agency has its own zone of discretion; each must respond to wills which come from far beyond its borders.

As with business, so with any of its provinces. An industry's way of order is an intricate affair. As a going concern it employs

devices, procedures, and understandings of many different sorts. Each of these has a distinct task, occupies a particular place among the practices of the trade, works only with its degree of perfection. Such usages may be inherited, adopted, or created. A process of borrowing and adaptation is constantly going on; conventions are engaged in a competitive struggle of their own. Elements from the most diverse sources are compounded into a scheme of industrial control. The best contrived design is rather an instrument to be used than a guarantee of industrial order. It is a combination of usages, each subject to revision, adaptation, obsolescence, and replacement. The quest leads away from words of learned length and ponderous sound—such as competition and monopoly—to the particularity in pattern by which business turns the techniques of production to account.

Circumstance as the Creator

As the world is not all black and white, so industry cannot be set down as the great antithesis between competition and monopoly. It holds far too much of detail and drama, of color and variety, to be crowded into a few simple molds. All that is design for business conduct has come out of the past. All industries carry the marks of half-planned growth in their structures, all have evolved their own distinctive usages. Each, like Ulysses, is a part of all that it has met; but since circumstance has variously beaten upon them, their ways of order lie far apart. Since experience has shaped them, industries are as sharply different with identities as unmistakable as the persons in a play. A series of pencil sketches may reveal somewhat a number of industrial characters. It will show at least for random samples that there is little in common; that they differ widely in the places in the national economy, in their forms of organization, in their everyday behavior. And even if they fall short of a picture of business enterprise at work, they will tell

something of the manner of thing an industry is, and will serve as a corrective to our policy in public control.

An industry is no more static than a character out of life. In itself and in its setting it is a highly volatile affair whose reality cannot be frozen into a picture. Even as we study, its identity refuses to stay put. Within a generation, a period in which a durable truth would suffer little abrasion, industries quite familiar to us have been transformed. At the turn of the century the horseless carriage was still a curiosity; it is today a flexible instrument of transportation whose uses are woven into the very fabric of our culture. The making of dresses has moved from home to shop within the lifetime of women who are still in middle age. As kerosene has given way to gasoline, one industry succeeds another in the processing of a common raw material. As little business surrenders the stage to big business, monopoly gives way to competition. Whiskey in name and technology boasts an ancient and honorable pedigree; but prohibition brought a stop to its lawful sale, and after a break with its past a time-honored trade was off to a new start. A little while ago cottonseed was a mere nuisance in the way of turning the fiber to account; the chemist has now contrived techniques for shunting its multiple elements into a thousand useful commodities. Our grandfathers were acquainted with raw milk which today we never see, but they had not a glimmer of the synthetic product or of the strange arrangements under which it is currently marketed. In structure, in performance, in trade practice, industries are all undergoing change—but at different tempos. None tarries in its development to be taken to a laboratory for observation. More likely than not the subject will put on a strange appearance before analysis is complete.

A classic case of circumstance as the author of design is the automobile.¹ There is nothing of the inevitable in the pattern

¹ See Mark Adams, "The Automobile—A Luxury Becomes a Necessity," in Walton Hamilton and others, *Price and Price Policies* (1938), pp. 27-81.

of the industry. If Henry Ford had been "a responsible person" by the bankers' code; if men of affairs had seen a future in the newfangled contraption; if the horseless carriage had come along a quarter of a century earlier or later; if a single factor in the stage setting had been other than it was, all would have been different. Funds would have been at hand; plants would have been built; motorcars would have been fashioned under one roof; a crude product would have been manufactured for the few who could have afforded the price; its rarity would have kept the strip of concrete always a thrill. The horse and buggy days would have had another span of life; walking would not now be a lost art. The factory, not the assembly line, would have provided the working model and doubtless would have dictated the structure of the industry.

But the industry came into a going economy, and those who created it were hard up. They had no capital to build factories, equip them with the necessary machinery, produce a hundred and one separate products and convert the parts into a motorcar. What they did was to make contract and short-term credit do the work of investment funds. At the time the art of making machines was well developed, and concerns were equipped for a much larger volume of orders than they were handling. Foundries and machine shops were readily adapted to the fashioning of automobile parts; and, since their regular merchandise carried the capital account, anything netted by excess capacity over and above the out-of-pocket entailed was just so much velvet. Slack seasons also offered unusually favorable terms. It was possible for the producer of motorcars to farm out the making of his parts more cheaply than he could have done it himself. Thus he rid himself of all manufacturing, reduced his activity to the single task of assembly, and replaced the intricate organization of a productive establishment with a cordon of contracts. The fashioning of materials and parts, which under other conditions might have been comprehended

within the parent venture, grew up as a series of dependent provinces.

Thus circumstance limited the task of the so-called manufacturer and set the stage for its performance. All he had to do was to take the parts made by others and at the least cost put them together into a motorcar. Analysis broke the process of assembly into its constituent elements; efficiency dictated an arrangement of the several steps in consecutive order. The assembly line, emerging as a makeshift, became the dominant factor in shaping the design of the industry. If expensive hand-fitting was to be avoided, the parts had to be standardized. A standard part may be used within an automobile wherever its kind is required. A standard part may be employed in two or more of a manufacturer's cars and carried over from one year's model to the next. The wider the domain of standardization, the greater the economies. The need for identical parts in large quantities has dictated the designing of speedier machines for their production. Division of labor is pushed to the limit; the same worker attaches the same part to identical cars over and over again. A frame is settled upon a conveyor; the car in the making gathers an accretion of parts as it moves along; it emerges as a finished automobile. The assembly line is fast; it is wasteless; it integrates into a single continuous process all that the producer must do.

The assembly line opened wide the door to price heresy. At the turn of the century the national economy was emerging; the railroad, with heavy trains and fixed grooves, was geared to a system; the country demanded a reliable and flexible instrument of transportation. It had to be small enough for personal use, nimble enough to reach any backwoods spot, have a cruising range of hundreds of miles. From the first the bolder promoters, especially Henry Ford, realized that a great potential demand was there if only price could be made to explore the market. Consequently manufacturers constantly gambled upon

larger sales at a lower price than past experience served to warrant. Since a larger volume meant a lower unit cost, they stood to gain rather than to lose so long as their guesses came true. The assembly line, in its change from expediency to principle, moved toward mechanical perfection and gave a steep graduation to this theory of expectancy. As price took the downward slope, car consciousness passed rapidly by contagion from income group to income group. The "turn-in" lowered the initial payment, made easier the purchase of a new car, and accelerated the triumphs of quantity production. An ingenious scheme of installment sales stimulated a lagging market. A curious reversal of economic roles was effected. At the beginning automobiles were produced to meet a demand; at the end the output had to be sold to keep the productive process going. The assembly line had become lord of the market.

Almost from the first the dealer was in a state of dependency. An upstart manufacturer without money could not set up his own marketing system. Independent merchants were demanded who could furnish their own capital, do their own hustling, and save the manufacturer from financial risk. So in the distribution of cars, agency gave way to a series of contracts. If a large number of companies had survived, dealer and manufacturer might have enjoyed equal power to shape the terms of this bargain. But at first the manufacturer needed funds to carry on; so he required of the dealer a payment in advance and demanded the remainder in cash on the delivery of the automobile. As companies became fewer and makes of cars came to be nationally known, an inequality in bargaining power developed. The manufacturer could, on short notice and without too much bother, get another dealer. The dealer had laid down his investment, built up his business, and identified himself with his ware. If his franchise was lost, he was undone. His commitment was an enduring one; his contract could be

revoked on short notice. Its perpetuation was at the pleasure of the baron of the assembly line whose conditions he was bound to accept. A usage of contract disguised a bond which had become feudal. The dealer was vassal to his overlord at Detroit.

The labor usages are likewise the creature of the assembly line. A standardization of product finds its reflection in a standardization of tasks. The continuous process of production has meant the quick staccato of endless iteration. So the typical job of the automobile worker is a rhythmic series of identical motions repeated at top speed for the duration of the shift. The nature of the work provided its own barrier against the use of organization as a protection of the workers. The union which had emerged from the handicrafts could make little appeal or be of little use. In the making of a motorcar skills had been broken down into their constituent elements; each of these was reduced to a routine task which a human automaton was called upon to perform. A few weeks' training would fit a raw recruit to replace the man dissatisfied with his job. The old-fashioned strike was of little value; a walkout would be followed at once by a walk-in of an equal number of willing workers out of the huge host of the unemployed. The result, for a period of years, was to grant to the manufacturer a recess from labor troubles. But the immunity was at the expense of a later exposure; for the situation invited the contagion of industrial unionism and the sit-down strike.

A curious aspect of the industrial order was the new role of the consumer. The investment banker had no confidence in its future, and the buyer of the motorcar was forced to take his place. In the early days Ford had his parts delivered on thirty days credit. By the time the bills were due, the cars had been assembled and marketed, and he had the cash on hand with which to meet them. It took intricate machines to reduce the assembly line to terms of precision and as the volume of

output swelled, the apparatus of production had to be enlarged many times. Although prices were lowered repeatedly, they were still found to be above a unit-cost which was on the decline. A margin of size persisted, and the dollars it brought in were ploughed back to finance the expansion of the plant. Such expenditures left their impress in the capital account, interest upon which is a legitimate expense. Thus the purchaser has graciously been permitted to pay to the manufacturer of his automobile an interest charge on an investment which came out of his own pocket. It is of note that such a charge is quite in accord with the economic mores.

Its beginning has given character to the industrial pattern. The economics of the assembly line has given a strategic place to the large corporation. It can, as a mere addendum, handle at a lower cost the traffic which might go to a small concern. In the resulting trend toward concentration, three companies dominate the field and independents survive only in the interstices of the industry. Each of the three establishments is an empire, whose territory stretches far beyond its corporate frontiers. In typewriters such a domain is organized as a business entity; in oil, activities reaching from well to filling station are integrated into a single venture. In automobiles, it is all done by contract; and voluntary agreements, subject to revision and revocation, give to the Detroit magnates a dominion which they do not have to incur the expense of owning. The dealers and the makers of parts are still tied by feudal bonds; the consumer, still in a merciful and involuntary way, comes across with new capital; and the laborers alone threaten serious revolt against the overlord.

The years have brought their changes. A work of art has been grafted upon a vehicle of transport and the motorcar has taken on style. The movement of price to a lower plane has been halted; the secondhand car had already preëmpted the unoccupied territory. A control of materials and of factories

turning out parts—usually as armament for the system of contracts—has brought its streaks of mutation. But novelty and the years have brought little more than patches and blurs to the original outline. You may ride in a car of this year's vintage; but the design of the industry still reflects the circumstance of the decade of the teens.

An attempt to discover an analogue reveals only an approximate pattern. The case of cigarettes presents the closest parallel.² The big four—now the big five, perhaps the big six—dominate an industry plagued by a host of little fellows. A managerial group, rather sharply separated from the owners, perpetuates itself in power, keeps stockholders quiescent with regular dividends, and in salary and bonus diverts the bulk of earnings into its own pockets. An assembly line resting upon a highly mechanized base reduces the working force and the labor cost to a minimum. A standard process, using alien ingredients, confuses the genuine tobacco flavor, and causes all cigarettes to taste alike. This very blurring allows one tobacco to be substituted for another in the "secret formula" and enlarges the supply from which the manufacturer must pick. An auction market, moving at a pace which human judgment cannot take, gives an appearance of competition to collusive bidding. The retail outlets handle many other wares; they cannot afford not to carry the favorite brands of customers; and the manufacturer exploits this situation to compel cigarettes to be handled at a loss. The tobacco in the ordinary package costs just less than two cents; labor accounts for hardly a cent; selling and advertising, which distinguishes where there is no substantial difference, runs to twice the figure. It is not unusual for the average earnings of the Big Three alone—running to \$100,000,000—to exceed the total farm value of the tobacco crop. The retailer probably fails to recover his cost. Here is another "empire model"; its likeness to the imperium of automobiles is striking;

² Carson Glass, *The Structure of the Cigarette Industry; a Study in Overlordship and Restraint* (unpublished manuscript).

its differences stand sharply out. It presents an industrial order in which overlords, through contract, collect their feudal dues. It is utterly impossible to crowd into the antithesis of competition and monopoly the problems of order and justice, of privilege and submission, which such a design holds.

Variations on a Theme of Design

It is easy enough to apply the term "competition" to women's dresses.³ The industry has grown too swiftly to permit vested interest, and fashion forbids structure to be frozen. A dress is an unstandardized product; there is no unit of measurement for the commodity; its value, resting upon intangibles which no man—or woman—can reduce to terms, is evasive and transitory. A firm which turns out a style that catches the popular eye enjoys its day of success and pockets huge profits; the firm that fails to catch the taste of the moment has its debts as a reward for its pains. Capital is of little consequence; trade-marks carry no persuasion; materials, workmanship, quality standards are secondary. The appeal of the silhouette is everything; and with each new model that appeal has to be freshly made. Success cannot be capitalized; there is no carry-over of good-will from year to year; a concern is off to a fresh start with every season.

Fashion decrees so much of design as the industry has. The lure of a prize, rather than the expectation of profits, draws adventurers into the industry. The trade is still open to all who will chance it; a small investment is enough for setting up shop; the necessary funds come largely from personal savings. The business is simplicity itself; a single productive establishment, and a farming-out system, encompass it all; no intricate lines of supply or of distribution have to be maintained. A plant, if it strikes it rich, has an almost indefinite power of

³ See Helen Everett Meiklejohn, "Dresses—the Impact of Fashion on a Business," in Walton Hamilton and others, *Price and Price Policies*, pp. 299-393.

expansion. There are far more volunteers than are called for and a Malthusian struggle for survival. A prosperous firm declines, an upstart comes to the top, the great mass goes to the wall. The curve of profits moves fitfully; a lack of accountancy alone conceals the endless iteration of losses. The rate of business mortality makes the life expectation of human beings look almost like immortality; the active span of the average firm cannot exceed five years.

Within this artless design the dress trade carries on. Year after year the industry presents much the same appearance, yet firms forever come and go. More capital continues to be lost than is taken out in profits. A large number of operators farm out their work to contractors who at once are foremen and employees. Lacking capital, they are not business men and assume no business responsibility. The caprice of ups and downs and inability to pay has fallen upon the workers in irregular employment, intolerable working conditions, and low wages. In self-defense they have banded together, and their organization has become a unifying force cutting horizontally across the industry. It has assumed functions performed by business agencies in other trades and has imparted whatever stability the industrial structure possesses. The sprawling cosmos of dress-making is concentrated within a few city blocks of Manhattan. A marketing system of jobbers, wholesalers, retailers—bound to it by the loosest sort of contractual ties—radiates to the remotest hamlet. The design is at once compact and disorderly; an intense centralization and an overdone competition go hand in hand.

Cottonseed competition, however, presents a rather different picture.⁴ The industry—if boundaries can be appointed to it—rests upon a veritable hierarchy of wares. The planter grows cotton, and its seed is an adventitious product which is no part

⁴ See George Marshall, "Cottonseed—Joint Products and Pyramidal Control," in Walton Hamilton and others, *Price and Price Policies*, pp. 201-97.

of his intention. At first the by-product was a sheer nuisance; now that chemists have endowed its ingredients with value, it enters a little bit into the farmer's calculation. Its supply is not consciously decreed; it emerges as a result of judgments concerned with another ware. The cottonseed goes to mill and emerges as four separate and wholly unlike products—oil, meal, hulls, and linters. Each of these enters a distinct channel of trade; oil as a vegetable shortening, a substitute for lard, the basis of a salad dressing; meal, as a food for beasts and fertilizer for fields; hulls, as roughage for cattle and swine; linters, as stuffing for upholstery and the material of a myriad of cellulose products. It is an element contained in articles as diverse as automobiles, writing paper, roofing, safety razors, phonograph records, and bookbindings. It influences the quality of meat cakes, the efficacy of cosmetics, the heft of steers, the batting average of baseball players, and the comfort of beds.

The ways of price are strange as it comes to grips with so Aladdin-like a good. Its supply makes no response to the ups and downs of its own price; nature has imposed upon it involuntary servitude to the price of cotton. Its resolution into oil, meal, hulls, and linters is in response to its own composition and the technical process of milling; use, demand and the market have nothing to do with the matter. As joint products of a by-product, each emerges as a definite quantum. The costs of milling can be set down as an aggregate; but since all four products emerge from a single indivisible process, its own "true cost" cannot be set down against any. Nor can expenses be resolved into four equal sums. If they were, meal could hardly pay its way, and upon hulls and linters a pecuniary load would be placed which they could never bear. Oil is affluent, meal hardly solvent, hulls and linters have to live upon a subsidy. And for the whole industry the cost of production is utterly alien to the formula for price.

For the quartet cost is a shadow which reflects price. The

industry is a medley of parties, unlike in strategic position, unlike in bargaining power, striving with strength and weakness to assert interest. The tenant farmer has no power to reach across the maze of by-products and joint-products to exact a price which will assure him a decent standard of life. The ginner, who separates the seed from the lint, bears the name Legion and can hardly exact a toll which the traffic might easily bear. The miller, whose facility at multiplication can turn one useless product into four useful ones, is better able to take care of himself. His trade association preaches kinship between his interest and those of his brethren and helps him to turn precept into practice. His customers are a bedlam, ranging from the impecunious food store which must have provender for old nags to the processers of Snowdrift, the giant companies which provide a nation's soap, and the Big Four entrenched in meat packing. Pressure of every sort and size is present; interests of every magnitude collide and carry on. All leave their impress upon an edifice of contracts which resembles a none too symmetrical pyramid.

Oil has a way of its own with the competitive design.⁵ In the good old days of kerosene, an octopus well known to every politician and magazine editor usurped a whole industry. In this era of concrete and gasoline, any major company towers above the Standard of yesterday. Yet in the industry are to be found not one, but more than half a dozen of these giants with enough room for a number of independents. Some of these are integrated corporations which like trunk lines stretch across the processes of extraction, transport, refining, and marketing. Others present in assorted lengths truncated segments of this continuous operation. At one end, off-set wells glare at each other across property lines; at the other extreme, rival filling

⁵ See Irene Till, "Gasoline—The Competition of Big Business," in Walton Hamilton and others, *Price and Price Policies*, pp. 117-99.

stations confront each other at the four corners of the cross-roads. A rivalry of brands draws the industry into militant array.

Somehow the industry defies the laws of economics. Oil is present in a pool; it belongs by law to the man who captures it; and the land above is all cut up into individual holdings. A Mr. ABC sinks a well; in self-defense Mr. DEF is forced to off-set it; presently Messrs. GHI, JKL, and MNO dig deep lest they dig too late. A boost in price is not necessary to quicken production; the fear of a neighbor getting there first is enough of an urge to haste. A drop in price puts no check on output, where the title lies with the one who acts first, the man who puts on the brake is lost. A legal usage, adopted from agriculture to which it is nimbly fitted, requires of him who leases "diligent cultivation"; and the operator needs little of such legal prodding to make his pumps work faster. So competitive zeal revises the law of supply and demand, and an excess of product becomes the industrial norm. Oil produced must be marketed as gasoline, and the great objective of the industry comes to be finding outlets for gallonage. Along the whole line which stretches from field to filling station a persistent pressure seeks a vent for surplus oil.

As a result two antithetical trends beat upon industrial design. The one is intense competition between great corporations. Brand is arrayed against brand in a war of words, and adjectives are regimented to create the friction of a consumer's choice between identical products. As one company assumes the offense and others counter the move, the stations of the various majors appear in clusters, and no corporation tarries to calculate the expense. In fact gallonage is the concern of one branch of the business, costing belongs to another, and currently they are in distinct hands. A militant situation highly charged only awaits its spark—and now and then competition explodes into

a violent price war. The other trend is the persistent necessity of some agency of control. To allow the ups and downs of a flexible price to regulate activity is a luxury the industry cannot afford. Although companies compete annually for his custom, the consumer cannot shop around for a better bargain. An informal leadership maintains the price structure. But it is delicately poised, and a flow of hot oil threatens to obliterate it. So the deluge of crude must be stopped at its source; and since the market cannot rise to the task, the state, an interstate compact, and a feudal authority have been called upon in succession. Control advances and is thrown back; but the government must inevitably assume a role of consequence in the industry.

The motion picture also presents a trunk-line design—but after its own kind.⁶ Upon the optical illusion of motion in pictures has been built in less than half a century one of the nation's greatest industries. The output, unlike oil, sugar, steel, is not a uniform product; the value of each picture lies in being unique; a search for quality standards reaches an ultimate in personal taste. The spectator wants to see a show only once; the five reels of celluloid can be presented over and over again; hence the exhibitor leases for the occasion his main stock in trade, and films circulate as they are consumed. A half-million, even a million persons, may be lured to witness the exotic charm of *Lost Horizon* or the ever-changing tapestry of *Gone with the Wind*. Unlike books, which are produced for a series of minority groups, movies are for the multitude. Units are unlike; yet each represents a creative work cast for mass consumption.

The strange art form came into an alien world—and it took time for industrial design to respond to the character of the ware. At first producer, distributor, exhibitor were apart; the

⁶ See the complaint and the answers of the various defendants in U.S. v. Paramount Pictures, Inc., S.D. N.Y., Eq. No. 87-273, filed July 20, 1938.

usage of free contract moved the pictures along; and the open market kept a chaotic industry quite volatile. The audience grew, the radius of circulation was enlarged, pictures became more pretentious. The bolder producers were willing to stake large sums upon spectacular offerings—if only the public wanted them. As outlets, committed to cost recovery, they began to acquire local theatres. The chain exhibitors, to insure themselves an adequate supply of attractions, likewise went into production. Today Paramount Pictures, Inc., Loew's Incorporated, Radio-Keith-Orpheum Corp., Warner Brothers, and Twentieth Century-Fox operate from studio to screen; a number of concerns limit themselves to production alone; and a host of first-run and neighborhood houses struggle for pictures and patronage.

As integration has pressed heavily upon the open market, a distinctive group of usages has come into being. The major companies occupy the strategic heights. They have cornered stars, turned out feature pictures, and imposed their own terms upon all who must have their wares. To their affiliated houses, pictures are passed along without benefit of the market; the *quid pro quo* is a mere matter of bookkeeping. A system of block-booking applies to outsiders; the independent cannot lease his attractions one by one in the open market; he must contract to take a number, good and bad, sight unseen, in bloc. Thus the risks of enterprise are unloaded upon the weaker party to the bargain. A stated period must elapse after the initial showing before the neighborhood house can have the picture; thus clearance is armament for the first-run theatre, draws to its doors the cream of the market and leaves the leftovers to the little fellow. A scheme of such usages distribute opportunity, patronage, and income. Integration cuts heavy grooves in a system of contracts and a vestigial competition serves the interests of the mighty.

In milk, the common good, the pursuit of gain, and time

have almost obliterated the competitive pattern.⁷ On the farm a milky way still stretches from the cow-shed to the table. In the small town the dairyman still trucks his own product in the early morning. In the city a strange economy has emerged to deposit the daily quarts at the doorstep. It is a far cry from dairy to apartment; milk is among the most perishable of products; as a medium for bad as well as for good little bacilli it can become a serious menace to health. The farmer, pushed farther away, could no longer make his rounds; an integrated operation was broken into two; an urban fellow took over the work of distribution. As a protection against disease, the municipal government undertook to inspect the farms from which the product came. Since health demanded high standards, many producers fell by the wayside; those who survived came to possess a distinctive privilege. It was easy enough to turn regulation into a sanction and to use the power of inspection to create a closed industry.

Thus in skeleton outline there emerged the milkshed—a territory, a host of approved herds, a group of privileged farmers converging to supply an urban community with a necessity of life. Inspection, pooling, and pasteurization made of fluid milk a synthetic product, of which the cow's bounty was only raw material. An urge toward the consumer's pocketbook created grades where there was no difference in kind. The expense of pasteurization, the endless miles of pavement to be covered, the high cost of duplicate routes, reduced the number of distributors to a handful. A meeting of common requirements brought a bond of unity to the producers, and experience dictated a united front in dealings with the distributor. A process of collective bargaining came to determine the price of milk, the terms of delivery, and the relations between the parties. As usual a small, compact group, with direct access to the market

⁷ See Irene Till, "Milk—the Politics of an Industry," in Walton Hamilton and others, *Price and Price Policies*, pp. 431-524.

became the lion to the trade and allowed the larger, less coherent group, located back country, to play the lamb. The drivers of delivery wagons, through the teamsters union, claimed wages far in excess of the average earnings of the farmers. Thus three interests of varying power came to make up the industry—and to the voiceless consumer was left the task of paying the bills.

The market as an agency of control was left far behind—and ingenuity flowered in creating substitutes for its mechanisms. A distinction between fluid and surplus milk kept the ugly force of supply at bay. The demand for fluid was calculated; gallons enough were measured off to meet it; the rest was shunted off to be canned, evaporated, and processed into butter and cheese. A market difference allowed different prices to be paid for identical units of the same commodity. After a while an intricate structure of multiple prices appeared, attuned to the many uses to which milk could be put. The demand for milk varies from season to season; the freshening of cows cannot be timed to so flexible a requirement; the basic surplus plan was elaborated to take care of the discrepancy. The farmers, admitted to the closed club of producers, were assigned quotas of fluid milk. As tickets of admission to the market, these quotas became industrial rights. Apart from land and herds, they came to constitute equities in property. The ways of the market were outmoded; the closed industry had created its own government. Public health had to bow before an irresponsible authority of its own creation.

In glass containers the lines of a private industrial government stand out even more sharply.⁸ As phials, beer bottles, and milk bottles the ware is the most ordinary device. Its raw materials are to be had almost everywhere; it demands little manual skill from labor; its technical process is easily mastered.

⁸ See U.S., Temporary National Economic Committee, Hearings on Patents, 1938-1939, pp. 377-677.

So long as the article was blown by hand, the trade was open, factories were widely scattered, and the rivalry of firms created a buyer's market. The lapse from competition followed the introduction of the machine process. Not one, but a number of inventions were born; their authors all sought patents; and for a time the air was filled with recrimination and cries of infringement. Amid the din of controversy, brethren moved toward an accord; Owens-Illinois and Empire got together; one by one the wayward were drawn in or frozen out. Christian charity went so far that Ball Brothers, who had their own process for fruit jars, accepted a license from a competitor and agreed to pay a royalty upon a patent of which they could make no use. An order for the whole industry was constructed upon the sanction of the grant of letters patent by the Federal Government.

The Hartford-Empire Company became sovereign to the industry. A creature of the dominant firms, it was set up to have and to hold patents. To it the patents of its various members were assigned. Its office was to invent, to contrive, to improve but at such a pace as always to keep alive a few basic patents. Concerns were to be licensed to manufacture glass containers upon conditions named by the owner of the patents. Only Owens is unrestricted in the kinds and amounts of glass containers it may produce. In all other instances Hartford-Empire inserted clauses restricting the kind of glassware to be fashioned, the character of the product and the uses to which it could be put, the quantity which might be processed, and the markets in which the licensee could distribute his product. Thus Liberty Glass Company could manufacture tumblers for drinking purposes only; Buck Glass Company, bottles for sacramental purposes only; and Gaynor Glass Works, by a catholic indulgence, "such bottles, jugs and demijohns as are used for vinegar, ciders, syrups, bleaching fluids, hair tonics, barber supplies and fluid extracts."

An aggregate of such instances reveals the industrial government. The authority of Hartford-Empire replaces the operation of the market. It decrees what firms may come into the industry and which must stay out. Its license is the card of admission to the trade—revokable almost at its pleasure. It makes a business province of each concern it accepts; appoints its market, specifies its product, decrees its price, and limits its quantity. Its powers of police extend over many feudal estates, and it levies toll upon every industry which must make use of glass containers. It imposes its will upon the public, taxes the consumer without his consent, and as an authority responsible only to itself lords it over a gigantic industrial empire.

It is easy enough to continue this catalog of cases. Anthracite and bituminous are both coal; they hail from the same geologic antiquity, are extracted by similar methods, and alike are employed in the production of energy. The largest elements in the price of each are the labor cost and the freight rate. Yet the arrangements under which they carry on vary widely. Anthracite is produced to be sold; bituminous is sold to be produced. Anthracite is disposed of on a spot, bituminous on a contract, market. The usages of the trade insure to anthracite the cost of production; wage rates are shaped by a process of collective bargaining; the custom of the industry fixes a charge for carrying reserves; freight rates, initiated by the carrier, are established by a public authority; the wholesaler's take and the retail mark-up are conventions of the trade. Not one of these items is determined by the market, yet they aggregate into price. Almost the same items appear in bituminous, but they are expenses which the operator must take into account in making his price. He must, in keen competition with his fellows, sell his coal where his customer wants it. And since the price that counts is the delivery price, he has as often as not to "absorb the freight" to meet the other fellow's offer. He sells to half a dozen destinations and, with freight subtracted from

delivery price, has just as many realization prices at his pit mouth. As a result, the price structure of bituminous comprehends more than four hundred thousand separate quotations. Beside it the price of anthracite, even in its multiple manifestations, is simplicity. As its market is whittled off, anthracite goes its conservative way; a system of usages, even under a public authority, cannot freeze the structure of bituminous. Yet the words "monopoly" and "competition" cannot sum up the differences between them.

In razor blades, there was once a large concern which through all the vicissitudes of demand and expense remained true to the five-cent blade. Now the industry consists of a number of small and nifty establishments, where the product under a bewildering variety of trade-names sells for a penny. The structure of the trade has been completely transformed for price to take such a tumble.⁹ The gifted composers of Tin Can Alley, in good old individual enterprise, market each his creations as sheet music, scores for motion pictures, and phonograph records. But the disposal of their secondary rights—through performance at movies, in restaurants, at roadhouses and over the air—is too much for the system. So such privileges under copyright are assigned to the American Society of Composers, Authors, and Publishers; it issues general licenses to perform any piece of music it controls; the net receipts are distributed to the authors according to ratings based upon popularity. The individual could never police the cosmos of entertainment against bootleg music; an indulgence in collectivism is essential to the cultivation of this secondary market. If there is even an approximation to a norm for an industry, wastepaper is an industry in reverse: for the housewife is the producer; the pasteboard mill is the consumer; and the stream of commerce flows backward.¹⁰ The

⁹ Edward Hincks, *The Price of Razor Blades* (unpublished manuscript).

¹⁰ Florence T. Hincks, *Wastepaper—an Industry in Reverse* (unpublished manuscript).

habits of industry find expression in a series of infinite variations on a theme of design.

O Tempora! O Mores!

Thus the way of man with industry is not as reason would have it. Common belief makes the market the dominant agency of control and flexible price its nimble instrument. A reliance upon the ups and downs of price to keep industry going, draw resources into the productive process, and to maintain a harmony between the flow of wares and the needs of the people is an article of American faith. A trio of words—supply, demand, price—present the popular picture of the national economy at work. In the light of the human realities it is well currently to examine the pretensions of the market to sovereignty.

Supply is a term descriptive of the quantity of the ware. At times it stands for the visible and the tangible—as with a meteoric stone, the autographs of John Milton, or bottles of bourbon of 1912. In respect to a good in production the term becomes indefinite; for market supply runs off into stocks and inventories and the capacity to produce and on to all the arrangements within the industry which are geared to production. The effective control of output differs from commodity to commodity. It may be, as with raw rubber, a concord among producers sanctioned by their trade; as with typewriters, an agreement among the gentlemen immediately concerned; as with glass containers, a private government resting upon a series of patents; as with sulphur, an aristocratic control of a limited resource; as with housing, a backwardness in the various arts which must be brought together in construction; or as with milk, an industry-erected wall over which only the ordained number of gallons can pour.

The word supply seems a bit strange when applied to many commodities. The elements out of which automobiles are made

stand ready for conscription; they are mustered into service only as cars are wanted, and popular demand is largely a factor of the national income. The tangible supply of bituminous lacks significance; it is capacity to produce—always far in excess of what will be taken—which is peddled on the market and quickened into product only as orders are secured. As the cracking process is improved, a given amount of crude-oil yields a larger and larger gallonage of gasoline; a development of the internal combustion engine increases the mileage which the motor fuel will use. As energy to keep the cars on the go down the concrete highway, the supply of oil is a function of the state of technology. The turn of a lever will increase the yield of gasoline at the expense of heavier fuel oils; the proportions between oil, meal, hulls, and linters are inexorably linked within a productive process. Out of an abundance enough oranges are marketed to meet the demand at a given price; the remainder is left on the ground to rot. An invention of a new process, a discovery of new properties in a material, a new layout for plant, an easier access to the investment market, a revision of working conditions—and supply makes its response.

Demand is a kindred concept with imported meaning. It comes from the culture without to meet industry in the market. Wares of trade are not geared to human needs by instruments of precision; things serve men with overlapping and waste, indirection and pretense. An article must be acceptable to be useful. What is once done tends to be repeated; crude answers to necessities—ingeniously fashioned or crudely stumbled upon—easily fall under the sway of the usual way of doing things. Thus wants which derive from the organism and the goods that satisfy them are alike compromised. Items which make up the diet are more than calories and vitamins; clothes long ago lost their primitive function of protecting the body; and the demand for shelter reflects the taste of the times. Always, everywhere, the urges which find vent in buying are set within

the matrix of social custom. The mark of a distinctive culture is upon every demand which comes to market.

Thus flexible price is not a mechanism which operates automatically upon demand. If the price of a good goes up—or annual incomes recede with a depression—demand does not of necessity fall. Some other item in the personal budget may be forfeited in its stead. Nor does a drop in price of itself increase demand; it merely removes a pecuniary obstacle to the purchase of the goods and makes it a candidate for wider consumption. But demand is a cultural phenomenon, which has many roots, and must wait upon a wider appreciation. In all its operation, flexible price must work in the imperfect medium of custom. If a commodity—such as milk, or shoes, or refrigerators—is entrenched in the standard of living, a decline in price may immediately react upon demand. But with many wares there is no such direct relationship. The demand for automobile tires changes from month to month, but the variation follows new-car sales, automobile mileage and the round of the seasons. The bondage is not pecuniary unless it be that of a complementary article; demand has wide flexibility but price has no causal role. Bituminous coal supplies energy to industry at work; its curve of demand, emancipated from price, attends the swing of good times and dull. Since the price tends to follow business activity, demand in its own stubborn way tends to increase as price rises, and to fall with its decline. The use of electricity depends upon ownership of washing machine, refrigerator, electric iron, and radio. Once the investment has been made, the consumption of current proceeds almost irrespective of price. Price exerts its influence upon demand within the matrix of the industrial folkways.

The same touch of crudeness, compromise, and indirection attends price in its control of industrial activity. It does not—often it cannot—adjust the supply of goods to the effective wants of the people. An increase or decrease in the price of

cotton spends its force against the traditions of the plantation system. To plant or not to plant is to the farmer the eternal question; but his answer is an attempt to guess how his fellows will react and to do the opposite. In a table of anticipations price is likely to become sheer irrelevance. In oil—where a dollar is norm—a price as low as ten cents a barrel will not arrest the flow of crude; since costs are largely fixed, it is necessary to run the wells harder in order to recoup expenses.

In many industries the trinity of supply, demand, and price is accorded only ceremonial respect. In baseball, the services of a wage slave like DiMaggio are fixed within a system of industrial usage. The Yankees alone have a right to bid; the price is very different from what it would be were the ivory market free and open. In automobiles price voices a deliberate merchandizing policy; it is an expression of guesses about the volume of sales, grounded in experience and refined by research. Its intent is to attract custom; supply has little to do with the matter; enough cars—far more than enough to meet the demand—can be produced and at a diminishing cost. In dresses price lines are grooved by custom; dresses are built to retail at specified sums; manufacturers put into their creations the best materials and workmanship they can afford; advantage is desperately sought in style. To coal operators the high price of anthracite is a matter of almost religious conviction. One decade gives way to another, substitute fuels invade the market, the world of circumstance goes its way—and the price persists. The high price of building continues despite new inventions in materials, designs, and processes. Nor will it profit the manufacturer of shingles or hardwood doors or plate glass to get his prices down. In construction many goods must be used together; against the grooves chiseled by a complement of backward arts, flexible price is helpless.

Thus price has its being within a cultural matrix; the free swing of its mechanics is compromised by the usages of the

market. As a trade becomes an industry, it develops its own ways of getting things done. In time these arrangements, growing in detail and intricacy, harden into rules which are generally followed. They have their origin in a definite effort to control price; remain as a hang-over of passing decisions; emerge as expediences which persist through sheer inertia; or merely blunder into being. As events beat upon them, trade practices may retain their integrity, respond to changing conditions, or be deflected to new uses. But, whatever their origin and character—a discount structure, a classification of customers, a bureau of estimate, a market information survey, a usage of delivered price, a cost formula—they tend to tame and direct the forces of competition. An industry has its vocabulary, its structure, its system of habits, its distinctive way of carrying on. The market becomes a constitutional government; the mechanics of supply and demand operate within a network of institutions. Flexible price performs its office within the folkways.

As the market loses its hold agencies arise to claim its authority. In each of the large milksheds, the distributors have become lords of a closed industry; fluid milk is barricaded against the surplus product; a collective agreement between dairyman and middleman decrees the price. In paper, brass, and fertilizer, a leader proclaims his price, and to meet competition, his brethren in the trade are forced to concur. In steel and cement a delivery price emerges almost automatically from the formula of the producer's quotation plus freight from the nearest basing point, and the control by the dominant firms is almost lost behind the smoke screen. In automobiles there can be no cost of production apart from volume; the larger the number of cars sold, the lower the unit expense. A complicated formula for arriving at the figure "f.o.b. Detroit" cannot conceal the operation of human speculation. With such a good, where unit cost falls with output, there is no escape from personal judgment. The estimate must be shrewd, else sales are

lost or solvency is gone. Such agents of control emerge as usurpers; but if their power persists and is not questioned, in time it becomes quite legitimate. As lords in their own right, operating through the mores, their authority becomes a matter of course. In many industries—milk is the prime example—a restoration of the free and open market is almost unthinkable. The competitive norm becomes a reform so radical that its restoration would wreck the existing establishment.

As creatures of growth such arrangements are not easily attacked. If its price system is laid alongside the competitive norm, steel has gone far astray. The whole structure of the industry has been elaborated about the focal centers of Pittsburgh, Birmingham, and Sparrow's Point, and an abolition of basing points would tear it asunder. About the method of quotation an intricate cultural web has been woven—the location of plants, the growth of cities, the rise of communities. The lives, the fortunes, the activities of a large population have all been caught up into a society which a distinctive scheme of delivered price dominates. Disturb the arrangements which make up the milkshed, then dairies, farm income, the source of a city's supply, the threads which bind the industry to its culture would take a severe shock. As the market loses its grip, a trade drifts far and competition freezes toward establishment. Whatever its character, the new control has taken its hostages and refuses to give them up. The departure vests its interest as it goes and erects barriers against a return to primitive design.

Thus man is the creator of industry, and the result is a varied pattern. It is hardly proper to set one part of his creation in antithesis to another, and to dub with the words "competition" and "monopoly" so stubborn, colorful, and intricate an order. Instead of black and white all is a matter of quality and degree. The tightest of trades has its zones of competition; a widely competitive industry may have its points of constrict-

tion. Monopoly is always somewhat less than a total eclipse of trade. In the contracts which arise every time a good in production changes hands, buyer and seller are not of necessity equal in bargaining power. Whether on the one side or the other the firms are large or small, many or few, affects materially the terms of the bargain. And if relations prove durable, advantage and disadvantage will become embedded in the structure of the industry.

Big and little, many or few, become architects of industrial design. A gigantic concern is set over against a host of little fellows. The power is there; the urge toward gain releases its use; the bargaining process itself puts on no brake. The stronger party may possess no monopoly; its conduct may be untainted with conspiracy; it may will no evil to the one with whom it deals. None the less, it enjoys an overshadowing advantage from which it is not easily dislodged. The vendors of farm machinery, commercial fertilizers, electric current, telephone service are in a position to say to the customer, "take it or leave it." The dominant buyer, set over against a host of insecure sellers, can likewise capitalize his strategic position. The processor holds the upper hand in dealing with the grower of wheat, tobacco, cotton, and corn. The chain store or the mail-order house—in respect to shoes, radios, toothpaste, imitation pearls—plays off one source of supply against another. It wears its connections loosely; in shopping around for better bargains it brings the threat of insecurity to all the firms with which it deals. Exclusion from a trade, a curb upon output, a control over price—all these are forms of restraint.

As often as not elements of competition and of monopoly are woven into the same industrial pattern. A minimum of understanding is essential to the orderly struggle for trade; there are severe limits to which the firms in an industry will allow the most brotherly accord to go. The major oil companies stand together in keeping production in line and barring hot oil from

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the market. Yet off-setting wells and rival filling stations proclaim a militancy which a solid front has not obliterated. The large motion picture companies, which stretch out fan-wise from Hollywood to chains of captive or independent theatres, are here in deadly, there in lax struggle for patronage. But bonds of union exclude the newcomer, impose vassalage upon the neighborhood house, and deny to a modern art a full opportunity for expression. Even gentlemen in agreement, who maintain a private police and bear down heavily upon chiselers, may vie avidly in the sale of their products. One and all they may maintain formally the quoted price, yet manage by one device or another to snare customers with "acceptable terms." Competition goes, yet it endures, for the only norm of its reality is a spectrum.

III

THE LAW WILL MAKE IT RIGHT

Sanctions to the Rescue

If men will not behave as reason dictates, the law will have to make it right. A freedom of contract did nicely enough so long as each of the parties had an alternative and neither was forced to deal. The urge toward gain impelled the seller to bargain with the buyer; but the same urge made it profitable for seller to unite with seller against the buyer, or buyer with buyer against the seller. It was hard for the business man to see how the acquisitive motive was all right if it found outlet along the vertical line which stretched from elementary material to ultimate product, and all wrong if it found expression along the horizontal line manned by rival firms. In the hurry of business he could not always tell which line was vertical and which horizontal. And in his more skeptical moments he suspected that, amid the intricacy of industrial processes, here and there a line was zigzag. It was evident that, in the name of the common good, he would have to be informed, educated, even policed.

It took the emergence of the national economy to stir up the cry, "there must be a law." As the last century entered its ultimate decade, agriculture—once the pillar of the nation's wealth—was driven back country. Petty trade was forced to move over to make place for big business, which to the masses of the people seemed strange, gigantic, and ruthless. As turbulent forces

took their way across a continent, the unruly times offered opportunity to the robber barons. In sugar, nails, copper, jute, cordage, borax, slate pencils, oil cloth, gutta-percha, barbed-fence wire, castor oil, the swashbucklers bluntly staked out their claims. The little fellow caught in the squeeze play; the independent crowded to the wall by the octopus; the farmer selling his corn, wheat, or tobacco in the tyranny of an impersonal market; the craftsman stripped of his trade by the machine; the consumer forced to take his ware at an artificial price or to go without—here were cruel and dramatic pressures. Industry was in the clutch of radical forces—and of iniquity. It was a period in which the ordinary man was confused, disturbed, resentful. Something was the matter with the market; the situation seemed too much for the state; surely the Federal Government could do something.

Of this confusion, disturbance, and resentment Congress was made painfully aware. It was responsive to public will and not unwilling to help. Yet a number of obstacles blurred its vision and arrested its action. It believed in a weak government and was loath to exercise a novel power. It was money-tight, very conscious of the decimal point, and reluctant to make appropriations for a police purpose. There had been the barest commitment to administration; the Interstate Commerce Commission was but three years old and the handful of State commissions little older. As yet experience had not proved creative, and there was little in the way of usage, device, or invention to offer. As little was known about industry, whose detail of distinctive ways had not yet become a subject of study. Thus it was hard for the emergent fact of the national economy to register.

A hearty intent and heroic phrasing brought forth many bills. Their common aim was to make monopoly in all its forms as odious at law as it was morally outrageous. Alike they proclaimed an open market too self-evident to be debated. The Sherman bill came to the Senate with the support of the

Finance Committee. It proposed to outlaw all arrangements which prevented "full and free competition," opened the Federal courts to actions for appropriate remedies, and provided for the forfeiture of the charters of offending corporations. Its terms were uncertain; it was vulnerable at many points; it drew shafts from friend and foe alike. Its author, confused, yielding, anxious to placate, time after time would concede objection and accept amendment. As from many desks inharmonious bits came into place, members became quite uncertain about the provisions of the intended act.

The more determined among the Senators were not content with so lukewarm a measure. Senator Reagan of Texas had gone trust-busting over the wide open spaces. No punctilios of an Eastern etiquette deterred his sturdy soul from naming names. To him a trust was a crime; the persons engaged in a conspiracy, criminals; and he wanted the United States Statutes bluntly to say so. He drove straight at the heart of current mischief. In a bill he told off a list of activities any one of which tended to create a trust; decreed participation in any plan abridging free competition a high misdemeanor; punished with a fine not to exceed ten thousand dollars and/or five years imprisonment at hard labor; and made each day of violation a separate offense. Senator Ingalls of Kansas, who knew the plight of the Midwestern farmer, sponsored an elaborate proposal severely to restrict trading in grain futures. For a time each of the two Senators sought to improve the Sherman Act by replacing it with his own. A colleague suggested that the measures were complements, not substitutes, to the original bill. So, by official action, the three were made one.

Yet somehow the whole of the resolve seemed to be different from the sum of the parts. A motion twice lost was now put for the third time, to recommit the bill—not to the Finance Committee whence it had come—but to the Committee on the Judiciary. That group, bent upon proving that it was not the

"great mausoleum of senatorial literature," returned the bill within six days; but it was so changed that its author could not recognize it. It had scrapped all that had been sent along, and with Senator Hoar of Massachusetts as draftsman, had written its own antitrust measure. The new bill recited for "commerce among the several states" the old common law against restraints of trade. The recitation was deemed necessary; for at the time it was assumed that without sanction by statute there could be no common law for the United States. The measure was written in the familiar symbols of the law, not in the language of industry or the idiom of public policy. Its terms, shaped by experience with a simpler economy, were taken over intact from the English law.

The element of novelty was the public character of the act. The older rule had been largely an affair of private law; nor was the right of personal action abandoned. Instead, to gentlemen who believed that the state which governs least governs best, it became the great reliance. Make it worth the while of the parties, and they will see to it that the act is enforced. The provision that the person hurt in his business by a monopoly or conspiracy might, upon proof in open court, collect three times the amount of his damage and costs was neatly lifted out of the Statute of Monopolies. An instrument was shaped by which an industry might be depended upon to police itself. But militant Senators had to be satisfied, and the Federal Government was given power to hunt the octopus in equity and at law. The party to a contract, combination, or conspiracy in restraint of trade, or to a monopoly, could on conviction be fined five thousand dollars and given a year in jail to think it over. Correctives could be sought through equity; the courts were empowered to enjoin unlawful practices and to dissolve illegal combines. As an addendum the Government might bring an action to confiscate wares shipped in interstate commerce in violation of the terms of the act. Private damages, the criminal

action, the plea in equity, the libel on the goods, were all invoked to keep the feet of men of affairs from straying down forbidden paths.

Almost without debate the Hoar—alias the Sherman—Act was passed by the Senate, hurried through the House, and became the great charter for the control of American business. The Fifty-first Congress vaguely sensed the disturbing on-rush of industrial change. Its task, as it faced the future, was to create an instrument of government for the emerging national economy; it was called upon to provide a barrier against shock, a road to order, a guarantee of justice. In debate it laid bare current symptoms of unruly forces which would gain in strength with the years; yet it could bring itself to the attack direct only in a babble of voices. It made no thrust at growing dangers; it came to no grips with the trends of the times; it made no attempt to shape the development of a rising capitalism. It acted when the voters would no longer tolerate delay. When the insistent need was to command the future, it looked to the past. On the eve of the greatest of industrial revolutions, the National Government was fitted out with a weapon forged to meet the needs of petty trade.

Law at an Alien Task

The date of its birth marks Antitrust. The Sherman Act could hardly have come earlier than 1890; the local nature of industry and distrust of strong government forbade. If it had come a quarter century later, it would doubtless have employed the administrative process to hold business enterprise to its lawful orbit. As it was, the legal controversy was made the instrument of public policy; the structure and practices of industries were to be amended by resort to litigation; the courts were given a governing office in the national economy. The law was invoked to keep business enterprise true to the ideal of free competition.

Unlike the market, the law does not enforce itself. A statute is a pious affectation unless someone invokes it and the courts turn its verbal symbols into commands that must be obeyed. For more than a decade the Sherman Act stood still under its own impotence. A private litigant now and then claimed his day in court, usually to discover that a suit against a mammoth corporation was beyond his resources. The several district attorneys scattered across the country were busy with such run-of-mine stuff as moonshining, counterfeiting, and mail fraud; a case against a robber baron was a perilous adventure that needed a lot of preliminary work. It remained for Roosevelt the First to adapt the statute to the national economy by establishing an Antitrust Division in the Department of Justice. Only then could there be a fixed responsibility, concerted action, a single insistent and unified program.

A statute lives by appropriations—and Antitrust has never been the favorite of Congress. T.R.'s "big stick"—by which respect for the law was to be dinned into the heads of the mighty—was a division of five attorneys and four stenographers. In 1903 only \$100,000 was available to police all of American industry. It took thirty years for the annual budget to make the grade to \$300,000. And it was not until 1939 that the preservation of the free and open market became so dear to the hearts of the people that they were willing to pay \$1,000,000 a year for it. An establishment all complete with a couple of hundred attorneys, stenographers enough to go around, and a sprinkling of economists is the creation of the last two years. The Bureau of Labor Statistics receives almost as much; the Maritime Commission and Bituminous Coal receive far more although their domains are single industries; the sums with which the Government fights insects are three times as large. It costs twenty times as much to maintain law and order in New York City as in the national economy. It is

obvious that attorneys and stenographers must be kept in rapid circulation and that so rare a bird as an economist must be spread very thin.

Its initial setup decrees for Antitrust its staff. Since the resort is to the law, its dominant need is for attorneys. It cannot afford to move against a restraint of trade unless it has a good chance to make the case stick in court. It must have a personnel competent in procedure, in the rules of evidence, in the moves that speed or delay litigation, in the techniques for turning disputes into issues which judges can understand. Its officials come with an attitude, a body of learning, a method of workmanship which derive from the discipline they profess. Their acquaintance with industry comes empirically as in case after case they meet its devious ways. In the encounter a cause at law—actual or in prospect—appoints the focus; and the facts of business do no more than supply the raw material for a legal process. The need of industrial analysis came to be recognized only when it could no longer be ignored; the economic analyst has never gained more than a foothold within the Division. The real question always concerns the structure and practice of an industry; the professional touch must commute the issue into an alien idiom before it can move at law toward an answer.

Poverty imposes upon Antitrust the necessity of selection. It cannot direct the ponderous machinery of justice against every trouble spot in the economy. It must, in conserving its resources, make a few cases do duty for many; it must make competition live, not by bringing to judgment every offender, but by throwing the fear of God into persons who would abandon it. The way of policy would be gradually to garner knowledge into a map of the national economy, to chart the lines along which trouble might be expected, to discover departures from the free and open market. In its stead the discipline of the law suggests the initiation of action on the basis of complaint; and complaint

proves to be a rather imperfect instrument of discovery. The great mass of these calls for help come from little fellows—the small manufacturer crowded against the wall, the dealer fretful at his peonage, the retailer confronted with sources of supply in solid phalanx. A large chain, a mail-order house, a metropolitan store does not complain; the volume in which they purchase gives them power to force concession. Where an industry operates in the grand manner, it is safer to patch up differences than to invoke the aid of so dangerous an outsider as the Government. When the independent lives at the sufferance of the major companies, he does not dare to complain.

All through the national economy vision is blurred, situations are obscure, complaint is no more than half articulate. If violations are blatant, victims may be expected to cry out. If they are discreet—or lie well hidden—no one may call them to notice. If they have become established, they are likely to be taken as a matter of course. A spectacular change in the habits of industry will bring them out; an imperceptible pressure toward a new order will leave them mute. The business man thinks in terms of output, market, profit and loss, not in the categories of public interest. It is the threat to his security, not violence to a command of Congress, which makes him call for help. A wrong of great consequence to the public may go unreported; an insignificant offence may provoke a flood of complaints. The filing of a suit always touches off a flood of letters from persons who have been wronged by the defendants. Complaint yields far too small and too rickety a foundation for a program of enforcement.

A number of considerations shape the selection of cases. A major antitrust case is almost of necessity a Hollywood affair. It is an enterprise in litigation on a grand scale and constitutes a heavy drain upon the resources available. However narrow the original question, the filing of the suit is a motion to open to official scrutiny the whole industry, its structure and

practice, its corporate setup, and marketing arrangements. A venture such as the Madison Oil Case¹ could go forward only at the expense of other suits that needed to be pushed. Expenses incident to preparation and trial ran well over \$150,000; and the prosecution of the ordinary major suit runs to well over \$50,000 a year. The limited budget of the Division will not allow many such debits. In addition to cost, the criteria of choice include the volume of complaints, the pressure of their reiterated beat, the strategic position of the industry, the power of the mighty to impose discipline upon their brethren, the magnitude of the injury to the general public, the ease or difficulty of securing proof, and the anticipated hazards of the battle ahead. Politics, too, is a term in the formula; as a member of the President's cabinet, the Attorney General is under obligation to make his decisions accord with the policies of the administration. It has sometimes happened that a proposed suit had to be cleared "away up."

The die once cast, the Government must build its case. Almost always it is confronted by a dearth of reliable materials. The testimony of witnesses is invaluable, but the weight of their evidence rarely sustains the charges. The victim feels the impact of a restraint, but was absent from the scene of the crime away back of the lines. The party to the conspiracy knows far more than he is willing to tell, and from him the truth has painfully to be extracted. The requisite data, in massive formation, must be secured from the persons—natural and corporate—who have violated the act. The Division has no power of subpoena with which to win access to the files of the accused. Its weapon is polite request; and where presently a legal combat may be staged, the amenities are at some disadvantage. Not even business men are likely to cooperate with zeal in an enterprise designed to prove that they are criminals. The inspection

¹ U.S. v. Socony-Vacuum Co., 23 F. Supp. 937 (1938); 105 Fed. (2d.) 809 (1939); 60 S. Ct. 811 (1940).

of records is regarded as a skirmish before battle; the accused are ready to throw up a defense.

The polite request is met with a variety of tactics. The small inexperienced company, abashed before the might of the United States—especially if FBI men are present—may tremble and open all files to inspection. The larger concern, wise in the ways of the Government, has a repertoire of retorts. It may recognize the want of official power, insist that its records are private papers, and bluntly refuse to produce a single document. It may graciously play along and defer hostile engagement: a discreet interval must be allowed for consideration; the only persons who know the files are not at present available; in a matter that may have legal consequences, officials do not feel free to act without consulting their lawyer—and he has just departed for the first vacation in years. Or it may gallantly say, "Certainly; our files are at your entire disposal—some eleven miles of them; now tell us exactly what you want and we will do our best to pull them out." Such a search is not without its reward; an ingenious lawyer can call for specific documents the existence of which he only suspects. The ordinary file yields a host of items that serve as clues, open leads, overtones to suspicion. It is the lucky company which does not possess at least one official with a passion for indiscreet letter writing. But, whatever the response, the Government bags a great deal less than it would like to take into court.

The yield indicates that it is safe to go ahead; yet the Division is puzzled as to the form of action. Its choice must be made between criminal process and plea in equity. If the intent is to sting the wrongdoers with punishment, the sterner method is the better. Its result will be a general warning to others not to repeat the offense. But if trade practices are to be amended, a combination is to be dissolved, or correctives are to be brought to the affairs of an industry, equity is the only available weapon. But, as often as not, the choice is merely nominal. If the Divi-

sion has its case well in hand and is able to meet every demand of the court for evidence, equity is an indulgence which it can well afford. But if it charges more than at the moment it can prove it is constrained to use the criminal action. For then it can impose upon a grand jury—which, after diligent inquiry, returns an indictment—its inquisitorial office. The grand jury issues subpoenas, commands witnesses to bring the documents with them—even to the last boxcar; and in camera, without the presence of counsel for the defense, explores the whole subject.

The grand jury is not the ideal agency of economic research; it is employed by the Division only because of the lack of anything better. Like all instruments upon which an alien task is thrust, it responds clumsily, expensively, and uncertainly to the demands upon it. A group of twenty-three men are continuously in session to discard rumor, separate fact from surmise, and determine the probability of guilt. A judge must be at hand, a group of attorneys kept busy, a retinue of judicial factotums in the offing. Witnesses must be brought from far and near to testify in person; their per diems run to a substantial sum. The task is to probe into an intricate matter, to get on top of a heap of facts, to cut through a mass of industrial activity and capture the design beneath. Skilled analysts, experienced in the ways of the national economy, would have great difficulty with such a job. It is hardly fair to expect a superlative insight from the good men and true whose office it is to return—or to refuse—an indictment. Even the weeks of the protracted session cannot endow inquiry with a professional character.

The procedure has its pulls and hauls. A silkstocking grand jury—a joy to the attorney whose trail leads toward the kidnapper, the counterfeiter, the user of the mails to defraud—may be a vexation in antitrust. It respects respectability, can think up extenuating circumstances, and has on occasion recited the law and distinguished cases. A jury of plain people pre-

sents another sort of difficulty; it becomes shocked as the story of conspiracy unfolds; and, after listening to half a dozen witnesses, is ready to return indictments against all suspicious characters. Often it is hard to hold back summary action until the materials for making the case stick are all in. Nominally of its own volition the grand jury indicts or refuses to indict; in reality discretion rests with the prosecuting attorney whose will it obeys. Its real function has become inquisitorial; an ancient agency of justice has become the instrument through which the government builds its case.

Trial by Legal Ordeal

In an antitrust action, litigation assumes the office of business; yet as it takes over the task, it retains its own ways. It attempts to impose order and justice upon an industry through the decorous processes of law. Business moves at a quick tempo; its activities run on in an endless series of transactions; always and forever events occur, questions are presented, decisions are to be made. The emerging judgments concern all who have a stake in the enterprise; they reach out to affect competing concerns and all interests which impinge; the lines of influence radiate to the fringes of the economic order. The march of events will not wait while the claims of every party who may be affected are measured with meticulous scrutiny. In carrying on a business there is no time for notice to all concerned, elaborate findings of facts, tentative orders, full hearings before they are made final, the ceremonial observance of due process. It is desirable that a question be answered right; it is imperative that it be answered—for business must go on.

An antitrust suit involves questions of the same sort. With regard to an industry the purpose is not to stop the contest or to shift the players, but to subdue the rules of the game to the requirements of fair play. Yet in a court an industrial problem must be fitted out with all the trappings of litigation. The sym-

bol must replace the reality; the real question be commuted into a cause at law; the issue be resolved by resort to a legalistic ordeal. The actual issue is whether a particular pricing policy, a scheme of open-price filing, a cost formula for price, a system of delivered price has a proper place in the pattern of an industry. The legal issue is whether, under judicial procedure and the rules of evidence, the conduct of certain individuals falls within or without the tolerance of the law. The translation brings to the revision of the economic order the hazards, confusions, evasions, circumlocutions, and procrastinations of the legal folkways. As if in their own right industrial issues were not perplexing enough, the route toward judgment is charted through alien borders.

The resort to law envelops a question of policy in personal controversy. The very terms "plaintiff" and "defendant" conceal the real question of choice. If the suit is in equity, every presumption is arrayed on the side of current practice. It is not enough that the revision proposed by the Government is by the norms of the statute the better. An extended breach of the law must be shown before the court can correct it by decreeing a remedy. If it is criminal, the status quo appears as a person accused—whose innocence must be presumed until proof of guilt stands out beyond a reasonable doubt. Through the centuries the law has created an intricate system of defense about the man whose freedom is in jeopardy. He must be fully informed of the charges and confronted by witnesses to his wrongdoing; he cannot be made to bear testimony against himself; his crime must stand out against every blinder his skilled lawyer can devise. All of these safeguards, reasonable enough when the life or liberty of a human being is at stake, become obstructing ceremonial when the issue is the amendment of a trade practice.

As the case goes forward it succumbs to the atmosphere of the courtroom. The industrial analyst recedes; the business

man becomes a spectator; attorneys representing the parties dig in for a long campaign. They have at each other with demurrer, interlocutory motion, question of venue, and all the tactics of seeking or avoiding a general engagement. The drift from the world of actuality into the shadowland of ritual is inevitable. Every move, every witness, every fact, every document becomes a counter in a legal game. The record does vicarious duty for industrial analysis; every item, favorable to one side, can win admission only against the cross-fire of the other. Every device which may speed or delay, flank the verbal defenses of the enemy, or color the conduct under review with guilt or innocence is called into play. The campaign is submerged in its events; the judge becomes engrossed in the detail of procedure; the what's-it-all-about gets lost in an interminable series of petty skirmishes. Procedure becomes a buttress against substantive attack; the defense entrenches itself behind fortifications for a protracted siege. The ancient art of chicane is called into play; its recognized devices are the mere elements out of which the higher procrastination is refined. The ancient spirit of trial by ordeal broods over the whole affair.

An epitome of the whole difficulty is the problem of proof. In respect to the facts, the defense enjoys every advantage; and time, patience, resource, guile, ingenuity, indirection, are necessary to draw it forth. All that emerges must be refined into the kind of testimony which the court will accept. Every item, before it can take a place on the record, must make its peace with the rules of evidence. This code, with its stubborn precisions, grew up out of concern with ordinary cases in tort, contract, and crime. Its exactions are pivoted upon a simple act, clean-cut in intent and effect, the deed of an individual or a small group of men. It seeks to protect a person who may be wrongfully accused against gossip, rumor, and suspicion, by limiting testimony to direct, straightforward statement. Its norms of admission, relevancy, competence, exclusion, are quite

alien to an attempt to straighten out the erring lines of an industrial pattern.

The key to the conflict is conspiracy. The rules of evidence are geared to direct proof of an overt act; yet the complaint concerns a business policy, the work of a host of persons, executed over a period of years. In an affair so complicated, with bits of the case coming only slowly into place, the judge has only the vaguest standards of reference. Any item is relevant if it is "connected up"; but such connection may not come until later and is never quite free from the frailty of inference. The judge must admit or reject as the witness is examined or a document is put in. Yet it is sheer speculation to determine in advance what may be relevant in view of the whole structure. Logic would suggest that the whole case be erected before any part of it is presented. But, since even the judiciary cannot rise to such a requirement, the process of justice accepts its compromise. The note may be taken for the cash; the item is accorded tentative acceptance upon promise that connecting tissue will later be supplied. Once in, of course, the bit of testimony exerts a will of its own and proceeds to make itself at home. If in the end it should be expurged from the record, it has left its impress upon the minds of those who must decide.

As with relevance, so with other standards of proof. The rule must be applied, yet it must be made to work and in the process common sense eats at rigidity. An attorney presents his testamentary materials; a rubric of offer, objection, ruling, performed by a professional cast, must purify every entry. Again and again lawyer and witness raise their antiphonal voices; the counsel for the adverse party chants the formula "incompetent, irrelevant, and immaterial"; the judge from the loft above interjects a response of "sustained" or "overruled"; and the loser, who intends to fight another day, comes in dramatically with "exception." As the witness proceeds, and as witness follows witness, a series of variations

are performed on an abiding theme. It is obvious that the scope of inquiry must be somewhat confined or the meandering of counsel would never cease; yet the technicalities cannot be depended upon to sort the material from the incompetent. The judge must be governed by his own standard as to how far indulgence is to go, and the man within becomes an added factor in the equation of materiality. One judge, who regards rules as a general guide, will set down a presumption in favor of what is offered and exclude only when he must. Another, who regards rules as severities, imposes upon every item the duty of proving its way into the record. A third, who frankly admits he is feeling his way, compromises, "Let it in for the time being and later we can exclude it if need be." Thus the judge's temperament, conception of his office, habits upon the bench, make stubborn or easy—but never speedy or pointed—the way of proof. Circumlocution, procrastination, indirection lurk in the very character of the testamentary process.

At times even the best of testimony may flatten itself against the evasive intricacy of corporate structure. The Government has a perfect case against lower officials who put the screws on dealers. But discretion lies with the executives—and the charter of the corporation is there to show it. The men at the top disavow the acts of their underlings and disclaim all responsibility. The proof, plain as day, has difficulty taking the high hurdle of agency. On occasion the rule-as-it-works produces a curious result. In the suit against General Motors for forcing its dealers to use its own system of finance, all officials were found innocent by a jury which heaped their collective guilt upon the company.² An impersonal corporation had acted without the intervention of any human agency.

As the combat proceeds the lines of an industrial pattern

² U.S. v. General Motors Corp., N.D. Ind., Criminal, No. 10,039, filed February, 1938 (unreported).

come slowly into place. A distorted perspective emerges in a logical fashion all its own. When the case is entirely in, its substance may be all trees and no forest. The hubbub of battle is not yet stilled; contradiction runs through the testimony; huge gaps appear in the structure; material facts are left upon the side lines as irrelevant; the significance of the result is honeycombed with peradventures. Yet in essence the matter is not a controversy between persons at all; the event toward which the ponderous mechanism of litigation goes its tortuous way is the revision of the rules under which an industry carries on.

And the event of the trial is not the end of the matter. One party or the other, disliking the result, will appeal; nor will it be satisfied by any judgment short of the United States Supreme Court. From complaint to ultimate answer, a gulf of years stretches. It was two years from the time it began its investigation before the Government felt secure enough to begin its suit against the major tobacco companies.³ A couple of years ago the Division brought action against the American Medical Association because of its interference with experiments in group health; the months have been consumed in interlocutory motions and only now is it in order for the case to be tried.⁴ The actual trial of the pending action against the Aluminum Company of America for monopoly is now in its third calendar year.⁵ If the event of a plea in equity is a decree, it may be a decade before the trust is dissolved or an erring corporation divests itself of its forbidden holdings. Such is the way of the law when it is invoked to give effect to a public policy.

³ U.S. v. American Tobacco Co., E. D. Ky., Criminal Information, No. 6670, filed July 24, 1940.

⁴ U.S. v. American Medical Association, 28 F. Supp. 752 (1939); 110 Fed. (2d) 703 (1940); 60 S. Ct. 1096 (1940).

⁵ U.S. The Aluminum Co. of America, S.D. N.Y., Eq. No. 85-73, filed April 23, 1937.

The Ramparts of Restraint

All of this—and it would be easy to recite on and on—has to do with procedure. It is just as hard to prove the substance of the charge against the armament which restraint throws up. The resort to law is a continuous process; as soon as a strategy of attack is perfected a defense is contrived to meet it and the game of trust-busting begins all over on another level. As the crude combinations of old were attacked in court, the men who lord it over oil and tobacco, steel and meat-packing, began to give conscious thought to their legal hazards. The pursuit of gain came to be served with modulated means; coercion was dissipated into a discipline of gentle reminders; the methods of the buccaneers were subdued into a fine art. As business became civilized, its leaders professed the amenities; they became versed in indirection, gentility, and finesse. As a result the overt, the blatant, and the outrageous are gone or dwell only on the fringes of polite industry. An informal dinner takes precedence over a meeting of conspirators; memoranda serve an immediate use and are then torn up; even the obtuse executive sees the advantage in the telephone over putting it in writing. Thus, as conspiracy keeps up with the times, tracks fade into clues, circumstance must pinch-hit for direct testimony, and proof must come by the slippery way of inference.

Nor is insulation against attack overlooked. The agent of common accord may be a stark outsider. The four large building contractors in a city depend upon the same bureau for their estimates. A number of oil companies severally pivot their prices upon the quotations in a single trade journal. All cheese, wherever sold, follows the market price, determined by an auction in the petty town of Plymouth, Wisconsin. A large manufacturer of brass converts his judgment of market prospects into price. The little fellows—who may not even

be personally acquainted—follow the leadership of the big boy. Even an innocent pursuit of knowledge may supply the tie that binds. A man of scientific bent, deeply touched by the ignorance of accounting among the brethren, contrives for a trade a cost formula for price. Rival firms do no more than put into practice his gospel done into terms of pecuniary precision. Thus men move in lock step, not by agreement among themselves, but in automatic response to identical stimuli, and combination is diluted into sheer coincidence.

Industry is on the move and restraint moves with it. As the fabric of an industrial order emerges, restraints are woven into its pattern. At a strategic point an advantage is asserted, extended, and fortified. The custom which makes the whole scheme go is blended into the operation of the trade. A mass of such usages may blanket a group of kindred trades. Origins may be quite forgotten, yet restrictive practices, like a clock wound up long ago, may continue to tick on. The building trades have been plastered over with a hierarchy of minor controls. Contractors, sub-contractors, investment agencies, supply houses, producers of materials, trade unions great and small, each with command and taboo, impose a medley of impeding tentacles upon a backward, easy-going, myopic industry. Together they engulf demand, technology, finance, enterprise, and employment in lethargy. Collusion in the good old blatant manner is to be found here and there. But far more significant is the freezing of what should be modern technology into a bedlam of feudal domains. As in case after case it weaves into the structure of an industry, restraint shifts its home from conscious accord to the folkways, and comes to command the persons through whom it operates.

The guilt for restraints may thus be dissipated into a general irresponsibility. The paper industry carries on through a durable agreement among gentlemen. Since no others gain admission to the closed club, a ceremonial meeting of minds

would be pure irrelevance. A stability that condescends to even so material a thing as a price structure is maintained through polite habits which are taken for granted. In lead pencils and fertilizers, quality standards have been used to do pioneer work. A multitude of brands has been reduced to a few grades, plainly marked, easily to be identified. The resulting simplicity invites uniform prices, makes departures easy to detect, and enables persuasion to be brought to bear upon mistaken brethren. The picture of conspiracy as a meeting by twilight of a trio of sinister persons, with their pointed hats close together, belongs to a darker age. Whose may have been the original sin no longer signifies; the modern way is to make the mores do it for you.

Yet restraint may be direct—if a legal sanction is at hand to offset the curse. The Constitution seeks “to promote the Progress of Science and useful Arts”; a statute, seeking to implement, grants to the inventor an exclusive right for a period of seventeen years. A stalling along, a series of changes in design, a staggering of improvements may give to its life a much greater span. The inventor assigns his rights to a corporation; the corporation erects a monopoly all complete with control over entrance into the industry, output and price, and uses its letters patent as armament against legal attack. A trio of patents for tetraethyl lead was employed—until the Supreme Court called a halt—for fixing the retail price of all gasoline in which the anti-knock substance was an ingredient.⁶ A single concern owns the patents and manufactures all the machines used in shoemaking. Its technical reach comprehends the whole process of production. The machines, never sold outright, are leased and serviced by the corporation. Thus it drives a monopoly horizontally through a very competitive industry. The fashioning of an optical lens—which reaches its wearer as a pair of spectacles—is by one company

⁶ Ethyl Gasoline Corp. v. U.S., 309 U.S. 436 (1940).

broken down into a series of operations which are assigned to the manufacturer, the wholesaler, and the retailer. A price-fixing scheme, running from factory to consumer, parallels the productive process, defending at every step with the public warrant the ingenious restraints. A patent thus becomes a shield which protects the industry from the oversight of the Government.

The technique of defense is itself the creature of the Sherman Act. If such a defense—which employs a sanction from the Government against an action by the Government—is valid, the owner of a patent becomes sovereign of an industry. The sole condition of his feudal tenure is that he keep alive a few basic patents. He must shape invention and discovery, not to an advance of the technical arts, but as a bulwark against public policy. So long as he can keep it up, his czar-like power extends to quality, grades, brands, capacity, output, price, channels of trade, division of territory, allocation of wares, and terms of sale. His authority has replaced the market in the control of the affairs of the industry. His power to condition, abridge, or deny opportunity is far more plenary than the Supreme Court has been willing to allow to the legislature of a state of the Union.⁷ All modern industry rests upon the machine technology; there is hardly a process which a sanction, ingenuity, and a bit of luck cannot obstruct. If the magic of a patent imparts innocence by contagion, a large industrial domain is put without the law.⁸

⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

⁸ How far the exclusive right granted to the inventor extends the courts have never clearly said. The recent decisions of the United States Supreme Court, especially *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939) and *Ethyl Gasoline Corp. v. U.S.*, 309 U.S. 436 (1940), seem to indicate that the use of patents as a sanction for restraint rests upon an insecure legal foundation. The disposition of concerns, against whom suits have been brought for such a use of patents, to settle out of court, lends corroborative support to this conclusion.

Other legal sanctions may be turned to legal defense. A protection of the public health has on occasion become a smoke screen for vested interest. In the name of clean milk, pure and undefiled, municipal law has created the milkshed, erected barricades against the man who would barge in, and created a closed industry. Inspection, half-divorced from its function, has been the foundation upon which an elaborate hierarchy of privilege has been erected. In many states the legislature has pronounced oleomargarine unhealthy, taxed or colored it off the market, and thrown a protective tariff about butter. Local ordinances, professing solicitude for the public safety, have circumscribed building with petty restrictions and have kept the work in the hands of a favored circle. An outsider, attempting to break into an urban trade, is often persuaded to desist; the town marshal pronounces the store he has rented a fire hazard. Morticians, barbers, beauty experts busy themselves politically to protect the public, to fix high standards for admission to the profession, and to keep newcomers out. In the liquor industry, regulation extends to hours, brands, prices, terms of payment; the sky alone fixes the limits of restraint if public morals can be plead in justification.

In fact all regulatory measures, however righteous their intent, run the risk of becoming legal defenses to private restraints. Where business takes to politics, public control becomes a counter in an acquisitive game. The use of legal warrants as a defense against authority has become widespread. So bold have the privileged become that an immunity for trade-marked goods has been inserted in the Sherman Act itself. Every round of legislative sittings turns out another group of sanctions. Restraint entrenches behind a fortified line and calls for enforcement to look well to its strategy.

The Grist from the Legal Mill

A statute is as vital as the legal processes which implement it. The Fifty-first Congress did well—in fact it did its best—by the Sherman Act; it fitted the statute out with the most efficacious remedies which were at hand. To its members industrialism was unfamiliar; its character, texture, problems could be little appreciated in advance; they could not reach into the future to distill experience into correctives to their initial decree. They viewed the act as an experiment, expected enforcement to reveal shortcomings, and looked to time to strengthen and amend. For half a century the original machinery has endured without supplement or amendment. Yet its impact has converted the original statute into the unique institution “antitrust in action.”

Of the four original remedies the libel against the goods may be quickly dismissed. It was a bright idea that the Government seize goods shipped in violation of the terms of the statute; yet the action has been invoked in only three cases: against “175 Cases of Cigarettes,” against “383,340 Ounces of Quinine Derivatives,” and against “5,898 Cases of Sardines.”⁹ All three were legal overtones to more direct suits; all three were expediences against corporations hard to reach by legal process; all three were dropped when the dominant cases were settled. The action packs a real wallop; its success leads to the confiscation of goods, paralyzes the trade of the offending corporation and drives it to a settlement. The trouble is that its impact cannot be limited; it drives a barrier between a commodity and its market, disturbs all industries which need the ware, imposes a doing-without upon the consumer, and lays its obstructing claws upon the guilty and the innocent alike.

The private suit for damages has been far more often used,

⁹ In 1907, 1928, and 1930, respectively.

but with little more success. The injured party is free to take his complaint into court, but once there he has to make out his case. In respect to proof he lacks the documentary evidence; nor does he possess access to subpoena or grand jury to commandeer what his cause demands. His action is subject to delay, interlocutory motion, the tactics of procrastination. If as a small business man he is up against the big fellow, the costs of litigation are a heavy drain and his suit may break down for want of funds long before the issue is ever resolved. If it survives, he must show the damage specifically due to the restraint from which he suffers. A discovery of cause within a complex is at best a parlous undertaking; and the isolation of the conspiracy from all the other factors which may have caused him to lose money and a commutation of the result into dollars and cents are sheer imputation. A lawsuit is not an ideal instrument for a searching inquiry into all the interwoven factors which for a business refuse to spell solvency.

Nor is the private action immune to abuse. A concern may start a "nuisance case" against a rival; a "strike suit" is a well-known card in the business game. A fly-by-night may enter a trade, develop a grievance, settle for a little ready cash, and move on to another pasture. As a handy weapon, the claim of damage may become a counter of high value in a fierce business struggle. It may be used to break, to harass, or to soften a business competitor and thus induce a private settlement. It lends itself easily to employment along the labor front. An employer goes into court, protests the conduct of a strike, and claims damages to three times the value of the trade and property injured. One of the largest sums ever assessed under any provision of the Sherman Act has been against a trade-union; ¹⁰ and, had the Supreme Court not re-

¹⁰ For \$232,240 in the so-called "Danbury Hatters Case," *Lawlor v. Loewe*, 209 Fed. 721 (1913); 235 U.S. 522 (1915).

versed a lower tribunal, a judgment above seven hundred thousand dollars would have been levied.¹¹ The private action is a rudderless suit; it has failed completely in its task of policing the national economy against restraint. Even as an instrument of justice between competitors, it has proved effective only where the Government has blazed the trail in a public action.

In antitrust an appearance of make-believe envelops the criminal action. The men in the dock are not denizens of the underworld, but gentlemen of substance and standing. They are members of the best clubs, pillars of Christian churches, leaders in civic enterprise. In the ordinary affairs of life, their integrity is beyond question. They are represented, not by shysters, but by leaders of the American bar. Judge and jury recognize the defendants as rulers in the national economy. There is little of the on-with-the-trial hurry which marks the case against the kidnapper, the automobile thief, or the dope peddler. The use of presumptions—so useful in speeding an action for arson, assault, fraud, or rape—halt before the respectability of the defendants. The defenses of the accused—presumption of innocence, ban upon self-crimination, proof beyond any reasonable doubt—are scrupulously observed. There emerges an atmosphere that permeates the whole courtroom. It all becomes an alien affair—cast in the stage play of a trial for a crime against the state.

Against such intangibles the penalty of imprisonment becomes futile. In five decades the number of criminal actions has run to 252, yet in only 24 did the court impose penal sentences. But even so poor an appearance exaggerates the reality. Eleven of the cases involved trade-unions where respectability was not an imponderable; and some 90 defendants received sentences of from a few months to two years. Two of the suits, strictly speaking, were not antitrust cases

¹¹ *Apex Hosiery Co. v. Leader*, 60 S. Ct. 982 (1940).

at all. In the World War, for want of a better, the Sherman Act served as an instrument for incarcerating eight suspects of espionage for a year each.¹² Only the eleven which remain concern violations of the Sherman Act by business men—and are in point. In ten of these the practice of racketeering—threats, intimidations, holdups, personal violence—was a significant element in the penal result. In the remaining case—Trenton Potteries—sentences of from thirty days to ten months were imposed upon eight individuals. Thus a single suit, in solitary splendor, proclaims that the respectable man of business goes to jail. But an addendum must be added; the court which gives can also suspend, and the terms are still unserved.¹³

The prison sentence has become a dead letter. Reliance must be placed upon fines to secure compliance with the Act. Yet the pecuniary detriment has been sparingly used. In fifty years penalties have been imposed in 97 cases; the sum assessed—ranging in the instance from \$50 to \$370,000—aggregates \$3,509,331. During this period business concentration has not been exactly dormant; yet in the court records a figure of \$70,000 a year proclaims the magnitude of the stream. If the law, tolerating restraint, had set against it a tax graduated to what the traffic could mercifully bear, a thousand times as much might have been collected. In an era of big business, the maximum fine of \$5,000 per corporation or individual, is utterly inadequate to secure compliance. The more compelling barriers against restraint are the cost of the suit, the threat of being convicted of crime, and the taint which an indictment brings. But corporations are too accustomed to legal armament to count seriously its cost; the hazard of conviction has little support in the statistical proba-

¹² U.S. v. Rintelen, 1 D. & J. 839 (1917); U.S. v. Bopp, 1 D. & J. 840-48 (1917).

¹³ *Federal Antitrust Laws with Summary of Cases Instituted by U.S.* (1938), pp. 191-92.

bilities; and as it is widely used the indictment loses its moral sting.

The decree in equity promises a constructive result; yet its force is rather narrowly spent. In the instant case it leaves the past as it is; all gains through activities pronounced illegal are undisturbed; the defendants pass through the confessional and are told to go and sin no more. As for the future, they are still free to seek the same objectives—so long as the means employed are clearly to be distinguished from those which the court forbids. Only the parties are bound who are named in the decree. As for others, where activities may be similar to or even identical with those condemned, there is little more than an admonition by hearsay. They may go their appointed ways until their own activities are called naughty and they are specifically warned not to do it again. A scheme of industrial usage may appear many times over in the national economy; yet an injunction is not a general notice to all who are concerned to cease and desist. Equity operates in the instance; its command cannot exceed the specific terms in which it is cast.

As an instrument of police the decree in equity operates upon a moral level. A judgment has its effect, not as a command to be obeyed, but as an invocation of "the fear of God." Its impact is emotional, rather than legislative; its urge, toward inducing business executives to abandon practices exposed to legal attack. The judgments thrown up are hortatory epistles whose warnings are intended for the whole industrial congregation. Yet circumstance constantly grooves channels in which the pursuit of gain can run; and against so dominant an urge the sermon from the bench is not enough. Equity, like the gospel, is tolerant of repentance at the last hour and forgives all that has gone before. The malefactor of great wealth is not disposed to be warned by the fate of another. It is time enough to seek salvation when he him-

self has been named in an action. Even then his lawyer's art of procrastination may defer the day of reckoning for a long, long time.

Nor have the courts entertained with a crusading fervor the suit in equity. In fifty years 272 proceedings have been started; some 93 have come to trial. Of these 64 have been won and 29 lost by the Government. Upon review the prosecution has lost 12 times, had 3 suits dismissed as moot, and secured 35 victories, thus showing a substantial gain. A mere count, of course, does not allow for the relative importance of cases. Nor can a tally in the column marked "won" tell how much or what sort of a legal triumph was scored. Certain contentions may be sustained, others emasculated. Language may be so circumscribed as to strip from the decree its general warning. A bit of dicta, inadvertently let in or consciously planted, may open a wider territory than the decree closes.

Moreover, a legal victory is one thing; its realization in the reform of the industry something else. The court—in the fulness of time—applies the law; but it has no facilities for seeing to it that its decree is carried out. It has power to punish any departure as contempt; but it has no means for discovering that its orders are not being obeyed. If the verdict is not a ceremonial flourish, the provisions of the decree must be policed. Since that task lies beyond judicial competence, it is thrown back upon the enforcement agency which currently is unable to undertake an office of such magnitude. If it does detect violations of the decree, Justice must be prepared to support the action for contempt with adequate proof. And that virtually means a fresh start on a new suit. As matters currently go, the decree of the court, whether for or against the Government, is looked upon as closing the case. Only twice has imprisonment for contempt been imposed to give effect to a decree; the one is a labor case, harking back to

the nineties; the other is an incident in the prosecution of a poultry racket. The incidents, separated by forty years, lie upon the periphery of industry. Fines for contempt aggregating \$11,500 have been assessed in three cases. In general the decree is signed and sealed; the court rests; the shock troops of Justice move on; the wrongdoers are left to amend their own behavior.

What has been the effect of the sixty decrees now in force, it is impossible to say. The law presumes innocence until wrongdoing has been proved. It, therefore, follows that all parties named in the decree have lived up to the letter of the law. But to assume that they have surrendered their objectives would be either to disparage their zeal in the pursuit of gain, or to reflect upon the competence of their attorneys. It is hard to garner positive proof that the resort to equity has eradicated the trouble-spots; and an attempt to drive a speculative argument to such a conclusion encounters serious hazards. Many paths are open to respect the letter and avoid the command; to write off obsolete practices and install up-to-date restraints; to change corporate identity by a juggling of holdings, even—if the defendants are bold enough—to chance it as if there were no decree.

At its best the decree is hardly broad enough to reach the industrial malady. It is limited to the persons who have been before the court; the matter in question concerns many other parties. It is in character a charter for the industry; yet its orbit is restricted to the correction of wrongs fully proved; and the roots of industrial disorder may lie elsewhere. Its injunction may be little more than an attempt to suppress symptoms. Unless the corrective reaches the source of the difficulty, the virus presently will become manifest in a new form. Industry moves, situations change, industrial custom takes a new form. Even the decree, adequate the moment it is written, may presently become outmoded. Where equity is

industrial umpire, obsolescence digs at the heels of its commands.¹⁴

In quality and tradition due process of law is patient, decorous, considerate, circumstantial. Its rubric has little place for rules of economy and dispatch; its scrupulous purpose is a meticulous justice between all the parties. The industrial process is dynamic, erratic, imperative, too hurried to pause for the ceremonial consideration of every claim at stake. The criminal action is a clumsy weapon whose nimblest controls are penalty and threat. The decrees of equity, painfully achieved, abide as frozen formulas; the trades to which they are addressed hasten upon their way. Criminal judgments become events in the history of industry. Many injunctions are decades old; the usages now in vogue are as fresh as the morning. The industry strides ahead, little embarrassed by fetters too out of date to bind. The use of litigation to give effect to economic policy is not the happiest of human inventions.

¹⁴ See Hamilton and Till, *Antitrust in Action*; a monograph being published by the U.S., Temporary National Economic Committee.

IV

INVITATION TO DESIGN

Betterment and Obsolescence

Authority is an essential of the competitive pattern. The pursuit of gain, without moral quality in itself, takes its own dynamic course. Its primitive drive is always toward the pecuniary advantage; it finds outlet as readily in a get-together as in a get-ahead. Its expression in collusion threatens the very institution which turns its rivalry to social account. So an outside power must maintain the open market. Else the gears cannot engage, checks subdue a turbulent urge, interests at stake remain in balance. The Government is invoked—in order that the mechanism of competition may remain self-regulating.

A half century ago authority rounded out the competitive pattern. The intent of the Sherman Act is clear enough. It is to keep enterprise free, to set competitive norms for business conduct, to make the open market an agency of industrial justice—in a word to provide for every industry a rule, a design, a limit to legal tolerance. Yet today the problems of order and justice persist; business conduct departs from its lawful standards; the lines of industrial structure blur a primitive competitive pattern. The question persists why the national economy—in spite of a wealth of human capacities, material resources, and an up-to-date technology—does not operate efficiently. It has been underlined by the

recent drive to enforce antitrust and by the current large-scale venture into national defense. Specific leads—surplus capacity, unemployment, inadequate standards of life—all drive back to this central theme of industrial order. And the elusive answer to the over-all question still remains at large. A search for it must move upon a number of planes.

It is well to begin within the four corners of the Sherman Act; to ask how its ponderous procedures may be converted into pliable devices of regulation. As a means to all else, Antitrust should be provided with funds adequate to the magnitude of its task. Its office is to police the national economy, and an appropriation shaped by the ideas of the nineties no longer fits the modern world. It would still have to deter by example rather than prosecute all offenders, but the samples should be numerous and varied enough to cover the industrial front. An array of cases should define the law in respect to petty trade, middle-sized business, large-scale enterprise. A barrage of actions should be directed against license agreements, privileges established upon patents, delivered price systems, the cost formula for price, the more ambitious activities of trade associations. The armament of public sanctions laid down as a defense of restrictive practices should be obliterated. Regional offices should constitute a series of watch-towers from which the whole economy may be kept under observation.

It is, likewise, high time for Antitrust to improve its access to information. For the task of investigation, Justice should be fitted out with the power of subpoena. The national economy is the instrument of general welfare; its industries perform a public office and are affected with a public interest. It is scoffing at reality to speak of its records as "private papers"—as if access were the right of the management to the exclusion of all other parties who have stakes in the operation of the concern. As matters currently go, consumers, laborers,

even stockholders may be scattered, unorganized, powerless; unless protected by the Government, their interests may be obscured or even ignored. A corporation, the creature of the State, is a convenience through which a medley of individuals combine contributions of diverse kinds into a collective enterprise. Yet, under the legal cloak of corporate personality, its officials have usurped a monopoly of knowledge of its affairs. A practice which turns the common concern of all into an exclusive privilege is an anachronism. As the representative alike of the public and of unvocal interests, Justice should as occasion demands have free access to all records.

Access to information would loosen the severities of legal process. It substitutes industrial analysis for the costly, clumsy, erratic process of inquiry by grand jury. It puts the criminal action and the plea in equity upon an equality and enables the choice between them to be made upon fitness for the instant case. It allows the more constructive way to be taken where the real issue is the correction of trade practice. It obviates the urge to prosecute where the activities in question correspond so crudely to the norm of a crime. The more drastic weapon should not be tucked away in moth balls but held in reserve; for an exhortation to good works and an injunction against bad ones means little unless there is something in reserve to make it good. But, as the accent shifts from punishment to prevention, the criminal action should be degraded from rule to exception.

But if equity is to be the main reliance, it must deter as well as correct. A couple of well-known legal dodges can be made to fit it for the larger task. Restraint of trade is now a crime against the state; shift to a civil base, amend the Sherman Act, and make it a wrong against the national economy. Next graft a public case in tort upon the equity process. The Government, then, in a single suit, could seek damages for past offenses and a revision of trade practices gone astray.

To be effective, the section on penalties must be rewritten. A fine of a dime will hardly stop the filching of a dollar; a five-thousand-dollar penalty will hardly kill off a conspiracy that promises to net five millions. It also does little good to limit the fine to the offending corporation when acts of restraint are decreed by its officials. If a company were made to forfeit twice its net income, and its ranking officials twice their salaries, for the period of violation, the hazard would become a factor of consequence in the making of policy. Then the impact of the punishment would be worthy of the offense. Such simple devices would make equity a two-way process; it would reach back into the past as well as project itself to the future; and antitrust might become in fact as well as in name a part of the law of the land.

On the Task of Retooling

An up-to-date model for a suit at law is not enough. Litigation itself is a crude weapon of industrial control, freighted with ritual, confused by irrelevance, moving ponderously to its result. The severities of process and proof are themselves powerful barriers about restrictive practices. At its best reform can do little more than improve an instrument never designed for its task. In other domains the administrative process has proved its worth. It might well be borrowed, given an experimental try, and gradually adapted to the work of antitrust.

There are already usages out of which an administrative process may be developed. At three separate times Justice has—with great suspicion—entertained “the advisory opinion.” Its advantages are obvious. It offers an informal survey of trade practices, removes suspicion from innocent arrangements, focuses attention upon necessary actions. It enables executives to subject their plans to legal scrutiny in advance, revise upon the basis of authoritative opinion, and go ahead

fearless of the law. At its ideal it would anticipate the result of a trial without its delay and expense; at its average, it would lessen the legal fog in which business has to carry on.

In spite of such advantages it has had hard going. Business men have been far more anxious to have advice than Justice has been to give it. An experience in "coöperation" has inevitably developed caution on the part of public officials. A plan may look quite innocent upon paper; but a lack of knowledge of the industry makes judgment a sheer guess. As it operates, the scheme changes its identity, often so drastically that not even its authors could recognize it. Accordingly the Antitrust Division has developed a wariness of "buying a pig in a poke." It has often answered requests with a verbose silence. It has seldom gone beyond the evasive assurance that "upon the facts as understood there appears to be no occasion for the institution of proceedings at this time." It has again and again come in strong on the refrain, "the Attorney General has no power to license anyone to violate any statute." Its attitude is that, unless innocence is blatant, indulgences are not to issue.

A novelty which has found a firmer foothold is the consent decree. Its origin stems, not from the Sherman Act—which makes no mention of it—but from the broad power of equity. From days of old, parties in controversy have conferred together, reached an understanding, reduced it to writing, and presented the instrument for the judge's blessing. Its legal status is a decree of the court; the violation of its command invites an action for contempt. In theory His Honor is the master in chancery and the document his order; in fact his is a ceremonial role and his sole contribution the judicial sanction which he lends. A renunciation of specified practices—sometimes a voluntary code for a whole industry—is set down as the decree of the court.

The consent decree permits a direct attack. Issues do not

have to be commuted into an alien idiom; a rubric of procedure does not obtrude and distract; the result is not shaped by a legalistic ordeal. No weight of intent and harm hangs heavy overhead; fact, value, consideration do not trickle in through the rules of evidence. The parties meet in informal conference; the opportunity at least is presented for industrial reality and public policy to register. The instrument, moreover, has a sweep which no process of law could impart. It can reach beyond the persons in legal combat to comprehend all who are in interest. It can attack the sources, as well as the symptoms, of restraint; consider factors which would never appear in open court; explore conduct wherever the trail leads; and even take into account the consequences of the proposed settlement. An action at law is limited to the orbit of restraint; the consent decree can amend, or even revise, the whole pattern of an industry.

As yet such promises have been little realized. The consent decree clings rather closely to the injunction whence it sprang. As now employed it emerges from a process of bargaining; its incentive, an escape from a tedious and uncertain ordeal at law. The Government seeks the best bargain it can get; the defendants yield as little as they must. It rarely runs beyond matters which could be proved; it is usually set down in the negative terms of "cease and desist." Its command, in the idiom of absolutes, is "permanent"—now, henceforth, and forever more. It takes scant account of growing knowledge, changing conditions, developing trade practices. A party is, of course, at liberty to go into court, allege its obsolescence, and propose revision. It is, however, hard to think of a motion to which judges have accorded a more frigid welcome. A provision that Justice shall at all times have free access to the company's records is only beginning to be written into its terms. The shadow of litigation still hovers over it; in general it seeks to anticipate about what a suit at law would yield.

But weakness does not inhere in the instrument. Its effective use demands a prelude of vigorous court action, for executives do not willingly shackle their own discretion. It demands also the proper intellectual resources—an over-all analysis of the industry and a well-thought out program of reform. The great difficulty lies, not in the capacity of the Government to impose its will, but in its inability to turn concessions to full account. At present the lack of information, of a clear grasp of industrial practice, of an arsenal of constructive proposals upon which to draw have made public officials timid. A host of fears block the exploration of its possibilities—an instrument which dares might be misused; a contingency might arise to make it a dead letter; a scheme designed to restore competition might in practice inhibit its return. The consent decree invites the creation of an industrial code; yet it hovers futilely upon the edge of negation.

The advisory opinion and the consent decree are changing usages. A conscious purpose can direct their growth into the sort of instrument which Antitrust can use. They need only to be combined and to be fitted out with requisite instruments to emerge as an administrative process. Safety in the use of such a weapon demands adequate knowledge and industrial analysis. It likewise requires a competent and continuous oversight of the operation of the trade. A case in court fixes its own focus; the action ceases with its legal event—conviction, consent decree, judgment in equity—and attention is shifted to a new front. Administration demands its result in the conduct of industry; its orders have to be followed up; its efforts are not to be relaxed until the trouble spots at which it thrusts are gone.

Thus the accent must shift and a tentative instrument replace the durable settlement. The Government complains or an industry seeks advice; all parties are heard, all issues fully explored; the matter comes to rest in an accord or a decree.

Its initial statement reflects the best of current knowledge and belief. To such an instrument a tentative official sanction is to be accorded. Justice cannot punish activities which conform to its terms, but it can at any time move for their amendment. Firms and their officials must live up to the mandate; but, as occasion points the way, they can seek revision. The venture in public control becomes an experiment; as knowledge comes and experience grows, the instrument of industrial government can be made to respond.

To the emerging process the activities of Antitrust would have to be regearred. Administration demands agencies skilled in industrial analysis and the technology of regulation. The task of the former would be industrial diagnosis, of the latter the prescription of remedies. A case-by-case approach could not be escaped, yet the results of trial and error should be cumulative. Trouble spots would resolve themselves into kinds; industries might possibly arrange themselves by type and variation. The topography of the national economy would little by little come into place. Techniques of control would be invented, borrowed, adapted, and improved; in time there might emerge an art of industrial regulation. A growing body of experience would be at hand upon which to draw as occasion should demand.

At this stage a remaking of the agency of control becomes inevitable. No institution could drive so far without a clash between its inherited form and its assumed office. The special work of Justice has been to prosecute; its cause-at-law has now been converted into the creation of the arrangements under which an industry carries on. The two tasks are distinct in character and must not be confused in organization. Justice shall remain free to inquire, to complain, to hail into court, to move for a remedy—activities in strict accord with its distinctive competence. But the agency which shapes the instrument under which the industry carries on must be freed

from its ancient bondage to litigation, given independence, fitted out with all the perquisites for the impartial performance of a constructive function. Justice and the industry may initiate, negotiate and propose; but ultimate decision, in respect to a code and its revision, must rest with another public authority.

The legal resort should be to an industrial court. Its bench of five or seven members should be as competent in the usages of business as they are learned in the law. To it should go cases concerned with the Sherman Act and the industrial codes by which it is implemented. It would determine guilt and assess fines, order dissolution and divestment, enjoin unlawful conduct. Instruments of industrial government would come to it for critical scrutiny and a judicial sanction. The judges, sitting singly, would dispose of the run-of-mine business; issues of consequence would go to the full bench. An appeal, strictly limited to questions of law, would lie only to the United States Supreme Court. A host of cases, now scattered throughout the courts would be gathered into a single calendar to be handled by jurists competent in matters of the national economy. In time its mounting body of decisions would come to constitute for business a flexible code of public control.

It is useless to ignore the magnitude and delicacy of the task. At its very threshold stand a series of questions. Exactly what is an industry? What are the limits of its coverage? What if the by-product of one industry—fuel oil—competes with the main product of another—bituminous coal? How are all to be represented who have a stake in the result? How are the rights of minorities to be protected? Of firms that live along the fringes? Of outsiders to whom a connection is necessary to carry on? As interest becomes more and more remote, where is the line to be drawn? Amid a battle of tongues, what chance is there of a real accord? Would the

resulting instrument bind only those who signed on the dotted line? Or would it become, as it were, "the law of trade" which all within the jurisdiction are bound to obey?

As codes of industrial government emerged, questions of policy would persist. Would the agency promote an advance of technology and the elimination of the unfit? Would it encourage a highly dynamic economy in which every concern has forever newly to make good? Or would it, in promoting economic security, keep the little fellow in business? Could it, in the face of pressure from organized petty trade escape "the politics of industry"? How could it avoid freezing the existing industrial structure with all its waste and extravagance? Could it keep the market open, or would it by sanction and injunction create vested interests within a rigid framework? As the years passed, would the impact of its decisions tend toward a more efficient and articulate economy? Would it, little by little, abandon the norm of competition for a more "realistic" philosophy?

It is easy to extend such questions into a real catechism. They indicate how uncharted is the way of administration, how great the obstacles to be faced, how easily the end is lost in concern for the instance. But from an adventure in the formal control of business there is no longer an escape. An agency, aware that industry is the instrument of the general welfare, must create for itself office, process, and policy.

Color and Compromise

The landscape of the national economy is not a checkerboard with squares of black and white; nor is it a dull monotonous gray. In many trades the lines of competition, even though set in a pattern of usage, still stand sharply out. A number of others, each for its own distinctive reason, could operate as rival units only with a sharp drop in efficiency. Still others have strayed so far from the pristine norm that

a return is a parlous adventure which would have to be shrewdly contrived and brilliantly executed. Hostages have been given to things-as-they-are and the growth of years would have to be trimmed away to make a fresh beginning. At one extreme are industries, none too true to the norm, whose performance is rather better than an enforced competition is likely to induce. At the other is the trade in which an excess of zeal has hammered the trim competitive design into a miniature of chaos. And in between, along the fringe, weaving in and out, are an assortment of industries in which elements of openness and restraint have been woven into the same pattern.

It is hardly possible to reduce industrial actuality to trim categories. A trinity of competition, in-between, and monopoly pitches most instances into the middle group, where the sorting has to be done all over again. A refinement into monopoly, duopoly, and oligopoly—which bears a faint aroma of the monarchy, oligarchy, democracy of high school civics—is stark mechanics which leaves the usages of the trades out of account. In the economy, as with organic life and human culture, there is no straight line of evolution; nor is there evident anywhere a general trend toward concentration of control. Industries forever react to the circumstances they face. They may blunder into a price war as well as conspire to escape it. The sequence of day-by-day decisions constantly cut light or deep into structure. As understanding increases, industries may—at least with mutations—fall into types. In the current state of our knowledge—or ignorance—they are a miscellaneous lot.

Over a vast realm antitrust is still an appropriate weapon of policy. A channel of trade is constricted at the strategic point; the correction is the smashing of the bottleneck. A concern, which has developed bodies for automobiles, stands ready to supply the railroads with up-to-date light-weight par-

lor and sleeping cars; the Pullman Company has converted its monopoly into a series of exclusive contracts; an antitrust action should provide an escape from obsolete equipment. A serious check is imposed upon group health by a boycott of organized medicine; the physicians serving "the consumer's coöperative" are excluded from hospitals and expelled from the brotherhood; the removal of the barrier clears the way for experimentation in the provision of medical services. It is impossible to establish a daily paper without a "news service." Yet access to any one of the three big news-gathering organizations is as carefully guarded as entrance to an exclusive club. If their facilities were open to all upon the same terms, journals might come to reflect the diverse currents of opinion in the community. In a multitude of such cases the Sherman Act can be made to give an adequate remedy.

In a domain quite as wide Antitrust demands a follow-up. The smash may be needed, but the single legal blow is not enough. Unless a corrective goes along, the end of the matter is likely to prove as bad as the beginning. A scheme of restraint to which an industry has grown accustomed is not at once to be thrown off; little by little it must be eradicated from the organism of trade practice. No sporadic attack, not even a series of staccato blows, can be made to clear away the growth. It is, of course, quite possible to secure immediate results; the recent drives of Justice in milk, fertilizer, potash, and the building trades have been followed by lower prices. The real test comes when the legal legions have been shifted elsewhere and the policing is removed. Nor is the decree in equity—with its let-there-be and let-there-not-be—self-operative. A corrective that pierces to the heart of the difficulty—and endures—defies the ordinary process of law. A constant oversight, a continuous check, a firm guidance by an administrative agency is essential to turn judicial command into industrial reality.

Nor is Antitrust a remedy for all the ills of competition. What of a case like textiles or women's dresses or bituminous coal, with its disorderly market, chaotic price-structure, overdone capacity. An excess of rivalry, as well as a dearth, may carry its detriment to the price structure. The plague of bankruptcy and an enduring state of insecurity are harms against which the economy must also be guarded. The use of twice the resources necessary to turn out our budget of bituminous coal shocks our sense of fitness as much as cotton ploughed under or oranges left to rot. A constriction in the stream of commerce near the oil refinery yields a toll rightly called "unearned increment"; the colossal waste in the system of filling stations, with its inflated retail margin, imposes a far heavier burden upon the consumer. At one point in an industry an antitrust action may allow traffic to move; at another point, where traffic needs to be regulated rather than released, another sort of attack is necessary.

In instances competition itself has become the mother of restraint. A glutted market tends to drive price below cost, touch off secret discounts, turn quotations into fictions, threaten the balance sheet with an ultimate item in red. In such a situation firms are prone to take counsel together to erect a barrier against disorder. Automobile dealers have conferred again and again in an effort to abate the intense rivalry which the pressure of the manufacturers has put upon them. In shoes, where a leasing of machinery reduces the capital requirement to a minimum, the industry is wide open; and manufacturers have sought some arrangement—restrictive if you will—to bring stabilization into the industry. In glass containers, the thinnest sort of an edge stands between a regimented industry—with patents as the instrument—and one as wide open as bituminous coal. Unless the regulatory office of the market is taken over by some other agency, a situation out of hand threatens to engulf all parties.

Yet any concerted move encounters serious obstacles. It runs afoul of the law; even a meeting of minds bears the sinister taint of restraint. As irony would have it, the more chaotic the situation, the greater the legal hazard. For where units are many, heat has marked the struggle for trade, feelings have grown tense, suspicions have been quickened. As a result a getting-together has hard going; the meetings must be frequent, the talk frank, the understandings clean-cut, explicit, above board. But where few units are involved, action is taken without fanfare of trumpets; conduct is clothed in accepted practice; the question direct is never put. In one case the "conspiracy" generates evidence as it goes; in the other inference must be employed to discover even its tracks. A positive control alone can impose a measure of order upon a riotous competitive pattern.

As a result public policy can employ no single method of attack. Industries are moving at various tempos in different directions. If some hasten toward concentration, others hurry toward a bigger and better competition; still others shuttle back and forth in response to stimuli which constantly beat upon them. A shift in technology, a deal in high finance, the appearance of a substitute ware, the loss of a foreign market, the development of a by-product—and the competitive pattern reveals new lines. An overcompetition may breed restraint; a restraint, through some weakness in its armor, may invite a return to competition. The national economy is an intricate affair; the attack upon its disorders must go forward case by case.

The need, therefore, is a procedure rather than a recipe. Broad ways of industrial direction may be distinguished, but each must be adjusted to unlike instances. As Antitrust moves away from litigation, its administrative process can serve other policies than the maintenance of competition.

Sufficient unto the Day

Antitrust is a symbol of democracy. It is an assertion that every industry is affected with a public interest. Apart from its operation, it keeps alive within public policy a value which must not be sacrificed or abridged. It asserts the business unit, the industry, the economy to be the instrument of the general welfare. If the fact falls short of the ideal, the call is to amend the fact rather than abandon the ideal. It may be that in many areas the open market has been compromised or is forever gone. Still its norms of order and justice endure to serve as standards for performance under another arrangement. Where the market is presumed to rule, there should be caution in substituting regulation. A hazard to the common good attends the enlargement of personal discretion.

No matter how competent the agency, informed persons shudder at the substitution. Only the impotence of competition to perform its task invites the change. A case for the shift is wanting unless safeguards can be contrived to replace those which the minority group, the consumers, the interests interlocked with the industry are forced to surrender. The administrative agency invites the very invasion of economic power which the competitive market is supposed to be proof against. It is played upon by all the pressures which powerful groups can muster into service.

Other ventures have not pointed an alluring way. The commissions have been very effective in closing public utilities to outsiders; they have been far less successful in assuring fair charges to the users of the services. Their rigidities have discouraged experimentation with price which might have brought power and light within the reach of lower and lower income groups. The Interstate Commerce Commission has been swamped beneath a deluge of detail. Save for the brief life of the Coördinator's office, it has spent little energy

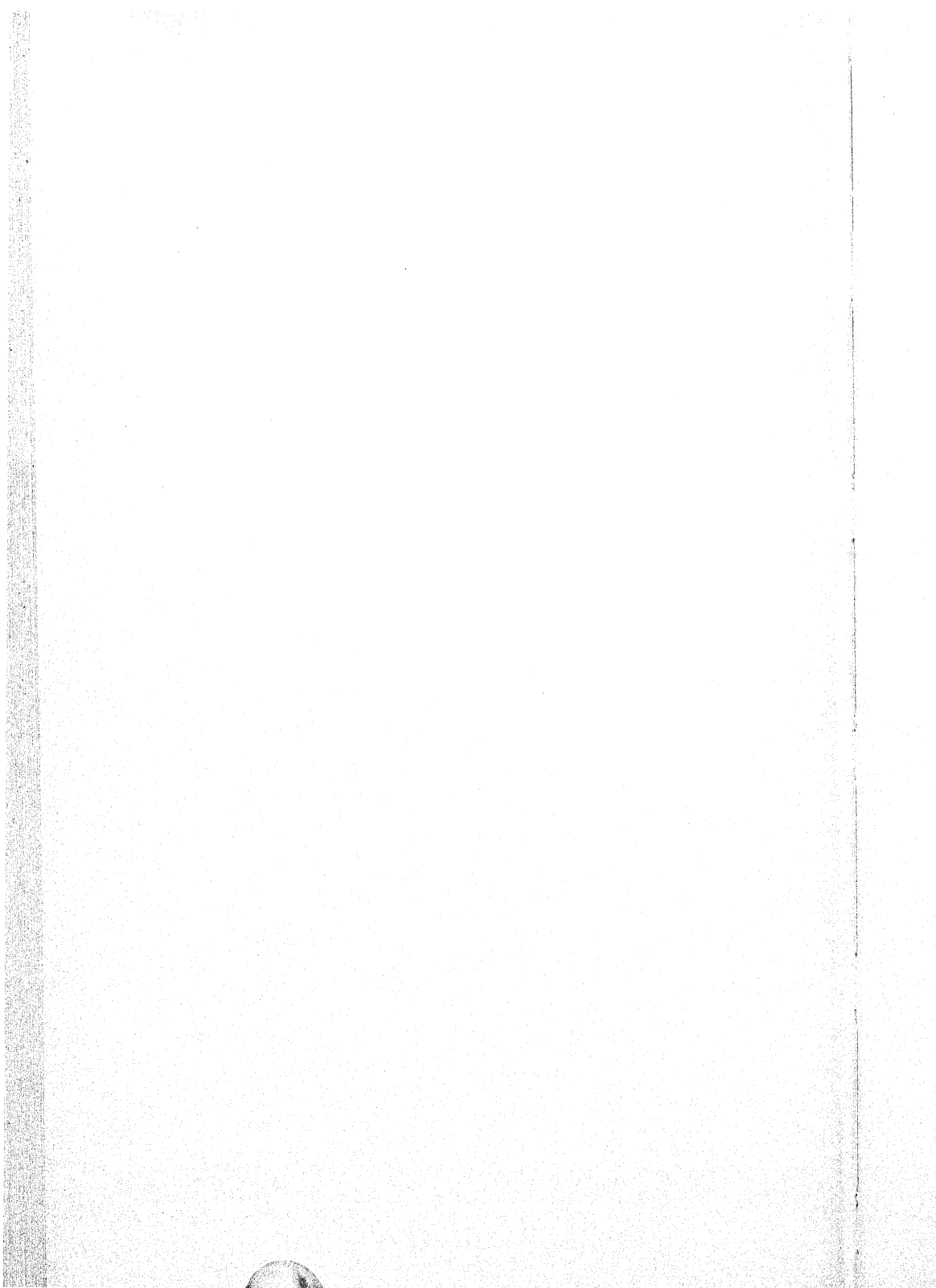
upon a forward planning for the railroads. The various agricultural controls—corn, milk, wheat, sugar, cotton, tobacco—have been very sensitive to the plight of the farmers, rather negligent of farm labor, indifferent to the general public who must pay the bill.

The NRA, brief as was its life, staged a full-dress performance of the hazards of the administrative process. Wide powers were granted—to become sanctions under which the strategic group could lord it over the industry. The strong were served with the affectation of protecting the weak; managerial privilege was entrenched under a pretense of fairness to the little fellow and to labor. Rules were written, presently to be smothered beneath a flood of exceptions; the vague clauses in codes were made to mean what interested parties wanted them to mean; “emergencies” were invoked to justify orders which otherwise would have been intolerable.

Such dangers, always imminent, may be forestalled. But vigilance must not relapse for even a moment. The question of privilege is seldom directly put; it emerges in a score of disguised issues. A scheme to restrict output is presented as a limitation upon the hours of labor. A cost formula for price is invoked to allow the little fellow to recover his expenses. A reduction of capacity is no more than an adjustment to what the market will take. A provision, fair upon its face, operates to the detriment of a firm whose progressive ways have been an embarrassment to the industry. The barrage of pressures is so persistent—the writing of a special rule, the invocation of an emergency, the declaration of an exception—that the staunchest official has difficulty in withstanding it. It emerges in forms so innocent that he must be forever alert lest his resolution be outflanked. The impulses from the privileged are omnipresent and strong; the voice of the unorganized, weak and faltering. To catch the perspective, the administrative agency must supply its own amplifier.

Such moves are no more than next steps. As change obeys its dynamic urge, their contribution may be a restatement of the problem of public control. Trends are already manifest of which these proposals take little account. But their lines must be more sharply defined before they can become the concern of an articulate public policy. The stress and strain in industrial structure proceeds from a clash which runs deep. At the moment a triple demand is being laid upon the national economy—it must take the turbulent course of events; it must assimilate a medley of public controls long overdue; it must provide an adequate national defense. It may well be that here is more traffic than the system of free enterprise can carry. But if competition belongs to an interlude in history—a lull between ages of unlike authority—only its events can reveal the next stage.

The task of keeping industry the instrument of the commonwealth is as arduous as it is everlasting.



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